No. 49.

The Supreme Court of the United States.

Brief of Record

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TERM No. 49.

MARTIN F. MORRIS, ET AL., *Appellants,*

vs.

THE UNITED STATES, *Appellee.*

Appeal from the Supreme Court of the District of Columbia.

BRIEF AND ARGUMENT FOR THE APPELLANTS, THE HEIRS OF JAMES MARKHAM MARSHALL.

A. LEO KNOTT,
Solicitor for Appellants.

The Supreme Court of the United States.

OCTOBER TERM, 1898.

MARTIN F. MORRIS, ET AL., *Appellants,* *vs.* THE UNITED STATES, *Appellee.*	APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

TERM NO. 49.

BRIEF AND ARGUMENT FOR THE APPELLANTS, THE HEIRS OF JAMES MARKHAM MARSHALL.

I.

A HISTORY OF THE CASE—THE ACTS OF CONGRESS AUTHORIZING RECLAMATIONS OF THE POTOMAC FLATS AND THE INSTITUTION OF THE SUIT—THE BILL FILED.

The United States Government contemplating the improvement of the harbor of Washington, the deepening of the channel of the Potomac, and the reclamation of what is known as "The Potomac Flats," and making them firm and fast lands, passed the Act of August 2, 1882 (22 Statutes, 198), making an appropriation therefor. This Act imposed on the Attorney-General of the United States the duty of examining all claims

to property involved in the premises affected by the proposed improvements, and, *and if he should deem it necessary* to institute suits at law or equity against all claimants of title etc. Proceedings under this Act were immediately taken, and a large area was reclaimed—Subsequently the Act of August 5, 1886 (24 Statutes, 1336) was passed, the first section of which *made it the duty of the Attorney-General of the United States* "to institute suit in the Supreme Court of the District of Columbia, against all persons and corporations, who may have, or pretended to have, any right title, claim or interest in any part of the land or water in the District of Columbia within the limits of the City of Washington, or exterior to said limits, and in front thereof towards the channel of the Potomac River and composing any part of the land or water affected by the improvement of the Potomac River or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto."

The suit was to be in the nature of a bill in equity and all parties claiming any such right, title or interest in the premises, were to be summoned to appear either by actual service of summons, or order of publication. The Court was clothed with full power to hear and determine every question of right, title, interest or claim arising in the premises, and further appropriation was forbidden until the final decision of the cause. See this Act, Record vol. 1, pages 13-14, Exhibit A of Complainant. In pursuance of this Act the Attorney-General of the United States on the 26th of November, 1886, filed the bill in this cause, making these respondents the heirs of James Marshall, among many other parties, defendants. They are mentioned by name in the entitling of the bill, and are referred to and embraced in the 10th paragraph of the bill as "the other defendants" who have or "pretend to have some title and interest to and in the land and water described in paragraph 3 of this bill, but the complainant is not informed as to the nature and extent of such claims * * * and leaves them to present their claims in their answer thereto as they may be advised." See the Bill, vol. 1, Record page 1, et seq.

From the language of the Act, and the purpose set forth in it, and from the character and language of the bill filed, it is clear that it was the object of the Government that any and every party having or claiming to have any right, title interest or claim in the premises in question, should have full and unrestricted right and opportunity to present such right etc. the Government waiving all technicalities, so that the very right and equity of the matter of the interest title, etc., should be ascertained and determined, to the end that the right of the United States to the premises "should be established and made clear," where it appeared, and compensation should be given, where just claims in law or equity should be shown to exist. Nothing other or less would be worthy of the Government of the United States.

II.

THE ORIGIN AND DERIVATION OF THE TITLE AND CLAIM OF THE HEIRS OF JAMES MARKHAM MARSHALL TO THE SOIL AND BED OF THE POTOMAC FLATS.

The discussion of this title opens an extensive enquiry and involves the necessity of an historical retrospect.

HISTORY OF THE CASE.

10 Apr., 1606.

James the First, King of Great Britain, on the 10th day of April, 1606, and in the fourth year of his reign, by letters patent granted to Sir Thomas Gates and others the first charter for lands and territory in Virginia, and for establishing colonies, who were permitted to divide themselves into two colonies or companies. The one called the *First Colony* to establish themselves between the 34th and 41st degrees of N. latitude, and the other to be called the *Second Colony*, between the 38th and 45th degrees of N. latitude. This grant to the two companies embraced all the territory of the United States from Cape Fear, on the Coast of North Carolina, to the latitude of the northern boundary of New York and Vermont.

Subsequently, on May 23rd, 1609, King James, on petition of the adventurers of the first company, did by his letters patent grant a charter of incorporation to a large number of Lords and gentlemen and others of England, to them and their successors, to be called and incorporated by the name of "The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony of Virginia," but more commonly known as the London Company.

This charter enlarged the privileges and powers of the London Company beyond what had been granted in the charter of 1606, and defined and limited the territory granted to the London Company to be "All those lands, countries and territories situate in America called Virginia," from the point of land called Cape or Point Comfort to the northward 200 miles and from Cape Comfort southward 200 miles and inland west and northwest from sea to sea."

"In consequence of the refusal of the London Company to surrender their charters and accept in their stead such a charter as the King might be pleased to grant, a *quo warranto* was issued out of the King's Bench, on which judgment was given in Trinity Term, 1624, against the London Company. Its charter was annulled and the rights granted by it reinvested in the Crown." See

Scharf's History of Maryland, Vol. I, p. 98,
Hildreth's Hist. U. S., Vol. I, pp. 128-29,
Bancroft's Hist. U. S., Vol. I, pp. 185-193,

where the subject is fully discussed and the arguments for and against this proceeding are fairly presented.

This action of the King has provoked a great deal of discussion, has met with much hostile criticism, and the validity of the judgment of the Court of King's Bench in vacating the charter of the London Company has been attempted to be impeached for the purpose of throwing discredit on the proprietary grants of territory covered by the vacated London Charter to the Proprietary government, or colonies of Maryland, Penn-

sylvania and North and South Carolina. But time has vindicated the wisdom and policy of such proceeding. It met with general acquiescence both in England and in the colony of Virginia itself, where the General Assembly, in 1643, on the question being mooted of a restoration of the charter of the London Company, sent an earnest remonstrance to the King against such proposed restoration. Bancroft, Vol. I, page 185, in commenting on this proceeding of the King, observes "That a corporation, whether commercial or proprietary, is, perhaps, the worst of sovereigns. * * * Where an individual is sovereign, there is room for appeal to magnanimity, to benevolence, to the love of glory; where the privilege of self-government is enjoyed, a permanent interest is sure to gain the ultimate ascendancy; but corporate ambition is deaf to mercy and insensible to shame." The testimony of Capt. John Smith, taken before the commissioners appointed by the King to examine into the condition of the colony, was distinctly against the Company. But, whatever opinion may be entertained of the merits of the controversy between the King and the London Company, it is too late, after the lapse of nearly three centuries, to challenge in a court of law the validity of a judgment on which reposes the existence and tranquility of great commonwealths and the rights of millions of people.

The effect of this judgment was to convert Virgina into a royal government, the territory of which was subject to the King's distribution. "This charter," says Marshall, ch. 9, Johnson vs. McIntosh, 8 Wheaton 578, referring to the charter of the London Company, "was annulled, so far as respected the rights of the Company by the judgment of the court of King's bench on a writ of *quo warranto*, but the whole effect allowed to this judgment was to revest in the crown *the powers of government and the title to the land within* its limits * * * The grants made out of the two original colonies, *after the resumption of their charters by the crowns, are examples* of this. The governments of New England, of New York, New Jersey, Pennsylvania, Marylamd and a part of Carolina, were thus created." Among the charters subsequently granted by the Kings

of England out of the territory thus reacquired by them by this judgment were :

1. The charter of Charles I. to Cecilius Calvert, baron of Baltimore, of the Province of Maryland.

2. The charter to Thomas Lord Culpeper and his associates of what is known as the Northern Neck of Virginia by James II. The charters granted were of two kinds, royal and proprietary. In Howard vs. Ingersoll, 13 Howard, 398, it is said by the Court : " It may be well here to say, that the power of the King to alter, change, enlarge or diminish the limits of his royal governments in America *cannot be denied.* These governments were of two kinds, royal and proprietary. In the former, the right of the soil and jurisdiction remained in the crown, and their boundaries described in letters patent, were subject to alteration at its pleasure ; for as it possessed the right of soil and government and delegated therein to its governors during pleasure, it might dispose of them in what manner and to whom it thought fit, might alter, extend or abridge them as its inclination or policy might declare. *In proprietary governments the right of soil as well as jurisdiction, was vested in the proprietors, and their limits being fixed by these charters, could not be altered but by their consent.*"

It is important to keep this distinction between royal and proprietary charters in mind throughout this case, as on it, as on a foundation, rest the rights of the proprietaries of Maryland, " their heirs and assigns," to the lands which are the subject of this controversy. The charter to Lord Baltimore was of this proprietary character, and with the absolute dominion and ownership of the soil within the limits of his charter were bestowed on him, " his heirs and assigns," the highest and most extensive rights of government and jurisdiction ever bestowed upon a subject by an English King.

III.

Statement of Claim and Title of the Heirs of James Marshall to the Land Underlying the Potomac River.

These respondents, the heirs at law of James Markham Marshall, claim "right, title and interest" to the land and soil under the waters of the Potomac River, and by virtue of this "right, title and interest" claim compensation from the Government of the United States for so much of the said land and soil as may be taken and appropriated by the Government in the exercise of its right of eminent domain in the prosecution of its contemplated improvements of "the Potomac Flats," under the Act of Congress approved August 5, 1886, directing the institution of this suit.

Origin, History and Derivation of this Right and Title of the Marshall Heirs.

This right and title to the lands under the waters of the Potomac ~~is~~ are derived to these respondents through numerous descents cast by law, devises and conveyances from these two charters.

1. The charter granted on the 20th of June, 1632, by Charles I, King of England, to Cecilius Calvert, Second Baron of Baltimore and First Lord Proprietary of the Province of Maryland.

2. The charter granted by James II, King of England, on the 27th day of September, 1698, to Thomas Lord Culpeper of a tract of land known and described as the Northern Neck of Virginia. This charter confirmed a previous grant of the same territory issued by Charles II to Ralph Lord Hopton and others. By purchase and inheritance the title and interests of these grantees had been acquired by John Lord Culpeper, the father of Thomas Culpeper, to whom this confirmatory charter was granted by James II.

For the first of these charters, that of the Province of Maryland, see Bozman's History of Maryland, Vol. II, page 9 et seq.; Scharf's History of Maryland, Vol. 1 ; Abert's Compiled Statutes District of Columbia, page 636, et seq.

For the second of these charters, that of James II to Thomas Lord Culpeper, of the Northern Neck of Virginia, see Record of this cause, Vol. III, page 1128–'29.

In the original answer of these respondents to the bill filed by the Government in this cause these respondents rested their claim to the bed and soil of the Potomac River on the title acquired by them from and under the charter of the 20th of September, 1688, granted to Thomas Lord Culpeper by James II, of the Northern Neck of Virginia. This extensive grant of land had for its northern boundary the Potomac River ; for its southern, the Rappahannock ; the Chesapeake Bay was its eastern, and a meridian line connecting the sources or head fountains of these two rivers was its western bonndary. (See original answer Record, Vol. I, page 66.

Subsequently these respondents, now appellants, acquired by purchase and assignment all the right, title and interest and claim of the heirs of Henry Harford, the last Lord Proprietary of Maryland, to the soil and bed of the Potomac River under the charter to their ancestor, Cecilius Calvert, and filed notices of motions for leave, first, to file an amended and supplemental answer to the Bill of the United States ; and, second, for leave to file a second amended and supplemental answer. These motions were denied, the one by Justice Cox (Vol. III of Record, page 334), the other by Ch. I. Bingham (Record, Vol. III, page 351). But on appeal to the Supreme Court of District in General Term, the orders refusing leave were reversed, and leave was granted to file both the first and second amended and supplemental answers of respondents. (See the order of reversal, Record, Vol. III, page 351.)

These respondents thereupon filed their respective first and second amended and supplemental answers, in which they set out their "Title, right, interest and claim to the lands in ques-

tion, acquired from the heirs of Henry Harford, the last Lord Proprietary of Maryland. For these two answers see Record, Vol. III, pages 66, 332, 333 and 336, 337.

IV.

Derivation of Title to These Respondents from the Grantees in the Above-Named Charters Respectively.

It is as well that the derivation of title as claimed by these respondents from the grantees respectively in the charter of Charles I. to the First Lord Baltimore of the Province of Maryland, and one in the charter of James II. to Thomas Lord Culpeper, should at one be fully set out.

Derivation of Title.—From Cecilius Calvert, First Lord Baltimore and Lord Proprietary.

Cecilius Calvert, the first Lord Proprietary, died seized of the Province of Maryland in 1675, and was succeeded by Charles I, his son and heir-at-law, who died in 1705, leaving Charles II, son of Benedict, deceased, and his grandson, his heir-at law. Charles II died in 1751, and was succeeded by Frederick, the last Lord Baltimore, who entered in the Province as devisee entail under the will of his father, and claiming as heir-at-law under his grandfather. Frederick docked the entail by suffering a common recovery in the Provincial Courts of Maryland and died without lawful issue in 1771, having devised the province to his natural son, Henry Harford. Henry Harford entered in the Province by his guardians and remained in possession thereof until the Revolution. This event deprived him of all his political authority and jurisdiction under the Charter, but did not, as we shall contend, deprive him, and could not deprive him or his heirs and assigns of their property rights in the Province, which by that event had become a State, including the property in controversy here—the Potomac Flats.

The will of Frederick, the last Lord Baltimore, is to be found recited in the third volume of this record, pages 1224-1229.

The rights and authority of Mr. Henry Harford as Lord Proprietary of Maryland under the charter and the will of his father, Lord Frederick, were fully recognized by the Legislature and the people of Maryland from the death of his father, in 1771, until the Revolution. (See 2, Kilty's Statutes.)

Kilty's Landholders' Assistant, 297.
Browne's History of Md. (American Com Series), 268.
McSherry's History of Md., 175.

At the death of his father, Lord Frederick, Henry Harford was a minor, and his rights were for some time exercised through his guardian. He appointed Robert Eden, a connection of his father, Governor of the Province, who filled that office until 1776. A full account of the manner in which Frederick, Lord Baltimore, docked or barred the entail of all his lands and proprietary estate in Maryland (created by his grandfather), by suffering a common recovery therein is given in the case of Calvert's Lessee vs. Sir Robert Eden, 2 Har. & McHenry, 279, its legality was sustained (see opinion of Harrison J. page 384). This was an action in ejectment, and in the special verdict a full and authentic statement of the descents, devises and numerous marriage settlements, of the Province of Maryland, in the Baltimore family is to be found. This verdict also finds (page 284) "that all estates, reversions and remainders of the Province of Maryland were docked and barred by Frederick, Lord Baltimore." This was done to enable him to devise the Province to his natural son, Henry Harford. Frederick had no legimate issue. His wife, the Lady Egerton, died without leaving any offspring one year after marriage. He had a son (Henry Harford) and a daughter by an Irish woman named Mary Whelan, to both of whom he seems to have been deeply attached and for whom he made ample provision, which by will was fully respected and carried out by his (Lord Frederick's) family.

This special verdict and its findings are important, and will hereafter be referred to again in connection with one of the

points to be made and argued in this brief, viz., that under the charter the Lords Baltimore had and enjoyed a dual capacity, they were Lords paramount, clothed with full political authority, power and jurisdiction in the Province, and Lords Proprietary or owners of all the land soils and waters and lands under the waters within the limits of their grant. In the first capacity they appointed governors, judges and other civil and military officers, collectors of port duties and revenue, and removed them at pleasure; sent out instructions to their appointees which were generally followed, even by the General Assembly of the Province frequently (the celebrated religious toleration Act of 1649, being one of them).

As Lords Proprietaries and owners of the soil, they enjoyed all the rights and were subject to all the incidents of ownership. In respect of that ownership they could sue or be sued in their own courts, they could transfer and alien their lands by the same conveyances as other owners. The statute of limitations could be pleaded by or against them. In further confirmation of this dual and distinct capacity, which was recognized throughout the whole history of the Province, reference may here be made to the Act of 21, George III, 1781. An Act passed to confirm and carry out certain articles of agreement between the devisees and heirs at law of Frederick Lord Baltimore respecting the Province of Maryland * * * and for establishing and verting the said Province in Henry Harford. This Act is referred to, not because it has or ever had any force in the Province, or rather State, which it had become in 1776, but because of its numerous recitals of events and transactions of the Baltimore family in regard to their Provincial estate running back more than a century, which plainly import and demonstrate this distinction of capacities in the Lords Proprietaries, which I have pointed out and will subsequently refer to more at large.

Henry Harford died on the 8th of December, 1834 (see testimony of Frederick Henry Harford, Record, Vol. III, page 1180), leaving a last will and testament (Record, Vol. III, page 1182), in which, after several bequests and devisees, he devised

"the rest, residue and remainder of his estate, real and personal, of whatsoever kind and wheresoever situated," to his son, Frederick Paul Harford. (See this clause, page 1192 of Vol. III of Record.)

Frederick Paul Harford died on the 21st of February, 1860 (see testimony of Frederick Henry Harford, page 1180 of Record, Vol. III), leaving a will in which he devised all his residuary, real and personal estate, to his son, Frederick Henry Harford. (See copy of this will, Vol. III of Record, page 1200, the residuary clause being at page 1203.) Frederick Henry Harford is still living.

See also on this matter of descent and heritage the deposition of Marian Rowley Conway, sister of Frederick Henry Harford (Vol. III of Record, page 1173, *et seq.*), and of Gerald Surman (Vol. III, page 1282, *et seq.*, of Record), and of Alfred James Luckett (page 1187, *et seq.*, of Vol. III of Record). See also deed of one of the heirs, Marian Rowley Conway, and her husband, Conroy Rowley Conway, dated 24th of June, 1889, granting all her interest in lands in the United States, and in the claim for restitution, etc., to her brother, the said Frederick Henry Harford. Frederick Henry Harford being thus by devise and purchase in possession of all "the interest, right, title and claim" of the heirs of Henry Harford, the last Lord Proprietary, did, on the 24th day of April, A. D. 1888, execute a full power of attorney to Robert G. Washington, of Westmoreland county, Va., authorizing and impowering the said Robert G. Washington to represent him in all matters in which he, the said Frederick Henry Harford, had any interest in the United States of America growing out of his heirship of said Henry Harford, deceased, the last Lord Proprietary of Maryland; and to execute all and any papers necessary to convey all and any estates, real or personal, in the United States derived to him, the Frederick Paul, from said Henry Harford, deceased, and execute and acknowledge all deeds and assurances, tranfers and assignments in the premises. (See Power of Attorney, Record, Vol. III, page 1169.) And the said Frederick Henry Harford, by Robert G.

Washington, his attorney in fact, did, on the 9th day of June 1888, execute and deliver to these respondents, the said heirs o the said James Markham Marshall, a deed of conveyance by which he, the said Frederick Henry Harford, granted *cufcoffed* etc., "all his (the said Frederick Paul's) right, title, interest and claim," either in law or equity, in and to the said Potomac River between both banks thereof, and the soil of all and singular the premises. (See this deed, Record, Vol. III, page 1170 *et seq.*) Frederick Henry Harford also, by his said attorney in fact, on the said 9th of June, 1888, assigned to these respondents, the heirs as aforesaid of said James Markham Marshall, all legal and equitable claim which the said Frederick Paul may have against the Government of the United States for restitution of the premises conveyed and mentioned in the preceding deed. (See this instrument, Record, Vol. III, page 1174–75.) These last three instruments were duly recorded among the land records of the District of Columbia.

This completes the claim of title of these respondents to the lands and soil underlying the Potomac River known as the "Flats," the premises in controversy, as derived to them from the charter of Charles I to Cecilius Calvert, the First Lord Proprietary of Maryland.

V.

The Derivation of Title of the Heirs of James Markham Marshall to these Lands Constituting the Potomac Flats as Coming from the Grant of James II to Thomas, Lord Culpeper, through Thomas, Lord Fairfax, of the Northern Neck of Virginia.

1. By a series of descents and devises the title to this territory thus granted to Lord Culpeper was subsequently cast, in all its entirety, on Thomas, Lord Fairfax, of Greenway Court, Virginia, and was in him at the time of his death. (See Record, Vol. III, page 1135; see also, Code of Va., Ed. 1819, Vol. I, page 343.) Fairfax was a citizen of Virginia. (See

Record, Vol. III, pages 1135-1159.) He died without direct descendants December, 1781, leaving a will in which he devised all his estate in Virginia to his nephew, Rev. Denny Martin, of London, England, on condition of his adopting the name and coat-of-arms of the Fairfax family. (See will, Vol. III of Record, page 1136, *et seq.*)

2. Denny Martin Fairfax, by deed dated 30th of August, 1797, conveyed to James Markham Marshall, the ancestor of these respondents, all his lands in the Northern Neck of Virginia (being the lands coming to him under the will of his uncle, Thomas, Lord Fairfax), except the tract of land known as "The Manor of Leeds." (Record, Vol. III, page 1311, *et seq.*)

3. Denny Martin Fairfax died in 1801, leaving a last will and testament in which, *inter alia*, he devised all the lands coming to him from his uncle, Lord Fairfax, and remaining undisposed of to his brother, Major-General Philip Martin. (See this will, Record, Vol. III, page 1315, *et seq.*)

4. On the 18th of October, 1806, this General Philip Martin, in consideration of the sum of £14,000, sold and conveyed to Rawleigh Colston, John Marshall and James Markham Marshall all the lands thus devised to him by his brother Denny, being a tract of about three hundred thousand acres, constituting "The Manor of Leeds," and lying in the counties of Fauquier, Loudon, Frederick and Shenandoah. (See Deed, Record, Vol. III, pages 1321-22.)

5. By two deeds *inter partes* executed on the 5th of October, 1808, between Rawleigh Colston and John and James Markham Marshall, all the right, title, interest and estate of said Rawleigh Colston in the lands conveyed by the said last-mentioned deed of Gen. Philip Martin, ~~was~~ well acquired by the said John Marshall and the said James Markham Marshall—the last named being the ancestors of these representatives. See Record Vol III p 1328-39

The fact that these representatives are the descendants and heirs-at-law of James Markham Marshall is established by several depositions of witnesses. (See Record, Vol. III, pages 1164–1168.)

This completes the chain of title of these representatives to the lands of the Potomac Flats, so far as that title depends upon and comes from the Culpeper grant of the Northern Neck of Virginia.

The character of this last-mentioned grant of James II to Thomas Lord Culpeper, the extent of territories conveyed the rights of ~~Lord~~ Land the title to the rivers, etc., forming its boundaries, these questions I shall leave to be set forth in the brief and argument submitted by the learned counsel who represents before this honorable Court the heirs of John Marshall, and shall confine my argument to the consideration of the title of these respondents, as it is derived from the charter of Charles I to the Lord Proprietary of Maryland.

VI.

The Charter to Lord Baltimore of the Province of Maryland, the Boundaries of the Province, the Grants of Territory and Jurisdiction, the Rights of the Grantee to the Lands and the Soil Under the Navigable Waters of the Province, &c.

1. The boundaries of the Province, as set forth in the third section of the charter, are as follows: "From Watkins' Point, on the Chesapeake Bay, to the main ocean on the east; thence by the ocean and Delaware Bay north, to the fortieth degree of north latitude; thence in a right line, by the degree aforesaid, unto the true meridian of the first fountain of the river *Potomac; thence verging toward the south unto the farther bank of the said river and following the same* (that is, bank), *on the west and south unto a certain place called Cinquack* (now Smith's Point), *situate near the mouth of the said river, where it disembogues into the aforesaid bay of Chesapeake*, and thence by the shortest line unto the aforesaid promontory or place called Watkins' Point."

It is here to be observed that by the boundaries thus clearly set out, the Province of Maryland embraced a much larger area than is embraced at present within the limits of Maryland. The

State of Delaware, a strip of the southern part of Pennsylvania, 16 miles wide and 139 miles long, and the rich valley lying between the north and south branch of the Potomac River, are within the charter limits of the Province.

It is with fifth line of this grant we have to do in this controversy—the line calling for its beginning at "*the true meridian of the first fountain of the river Potomac, thence verging towards the south unto the farther bank of the same river, and following the same on the west and south unto a certain place called 'Cinquack.'*" The territory thus bounded was given, granted and confirmed in this section to Cecilius Calvert, Baron of Baltimore, his heirs and assigns.

RIGHTS OF TERRITORY AND JURISDICTION GRANTED.

2. The fourth section of the charter declares: "We do grant and likewise confirm unto the said baron of Baltimore, his heirs and assigns, all the islands and islets within the limits aforesaid, all and singular the islands and islets which have been or shall be formed in the sea situate within ten marine leagues from the said shore, * * * with all and singular *the ports, harbors, bays, rivers and straits* belonging to the region and islands aforesaid, and *all the soil*, plains, woods, mountains, marshes, lakes, *rivers*, bays and straits situate and being within the metes, bounds and limits aforesaid, * * * with all and singular such, and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties and royal rights and temporal franchises whatsoever, as well by sea as by land, within the region and limits aforesaid to be had, exercised, used and enjoyed as any bishop of Durham within the bishoprick or court's palatinate of Durham in our Kingdom of England ever heretofore hath, had, held, used or enjoyed, or of right could or ought to have held, use or enjoy.

VII.

THE TERMS ON WHICH THIS GRANT WAS HOLDEN.

3. The fifth section declares: "And we do by these presents for us, our heirs and successors, make, create and constitute

him the now baron of Baltimore and his heirs absolute lords and proprietaries of the region aforesaid and of all other the premises saving the faith and allegiance and sovereign dominion due to us: *to have, hold, possess and enjoy the said region, etc., and other the premises unto the aforesaid Baron of Baltimore and to his heirs and assigns, to the sole and proper behoof and use of him, the now Baron of Baltimore, his heirs and assigns forever.* To hold of us, our heirs and successors, kings of England, as our Castle of Windsor in our county of Berks, in *free and common socage by fealty only for all services, and not in capite.* Yielding, therefore, unto us, our heirs and successors, two Indian arrows of those parts, to be delivered at the said Castle of Windsor every year on Tuesday in Easter week."

4. By the sixth section the territory thus granted was erected and incorporated into a Province and named Maryland.

5. By the seventh section the most extensive grant of civil and political jurisdiction, of legislative and executive power, was conferred on the Lord Proprietary and his heirs ever conferred on a subject by an English monarch; a grant so extensive and comprehensive in its concession of royal rights and jurisdiction over persons and things that but for certain saving clauses and provisos the Province might be regarded as a principality independent of the Crown and its proprietary a petty king. He and his heirs were empowered to make laws "for the good and happy government of the Province according to his and their sound discretions, whether relating to the public state of the Province or the private utility of the inhabitants, with the advice, consent and approbation, however, of the free men of the Province," a right of initiative in legislation which the proprietary claimed and exercised for many years. All laws of importance were drawn up by the proprietary and sent over from England during the early years of the Province; among them the celebrated toleration act of 1649. He was empowered to execute the laws on all persons within the limits of his territory, or while sailing to and from the Province, extend-

ing to privation of life or member; to pardon all offenses; to establish courts and clothe them with jurisdiction; to appoint judges and other officers and remove them at his pleasure; to hold pleas; all writs issued in his name. These laws, however, it was provided, "should be consonant to reason and be not repugnant to, but (as far as conveniently may be) agreeable to the laws, statutes, customs and rights of this our Kingdom of England."

6. By the sixteenth section he was empowered to erect and create ports and harbors, and endow the same with such rights, privileges and jurisdiction as he might think proper; to require all ships coming to the province to load and unload at such ports and harbors, and to pay tonnage duties. The right to fish in the waters of the province was reserved to all the subjects of the realm, and to cure fish on the banks of the waters not doing any notable damage to the Proprietary or the inhabitants.

7. By the eighteenth section the Proprietary was empowered to grant lands "in fee simple, fee-tail, for years or for life, such grantees to hold of the said baron of Baltimore, his heirs and assigns on such services, customs and rents as he or they should prescribe, and *not* of us, our heirs and successor; the statute of *quia emptores* or any other statute, act, usage or law or custom in England to the contrary notwithstanding."

8. By the twentieth section it was expressly covenanted by the King for himself, his heirs and successors, that he renounced for him and them, all and any right or claim then or at any time to impose or cause to be imposed any impositions, customs or other taxations, quotas or contributions whatever upon the residents or inhabitants and merchants of said province, their servants, ministers, factors or assigns, upon their goods, lands, tenements or merchandises.

9. And to make his grace and favor to his friend and former servant doubly sure and beyond the reach of adverse construction, the common law rule in construing grants from the sovereign was annulled, and the King charged and enjoined all his judicatories "*that in all doubts or questions which should arise*

concerning the true sense of any word, clause or sentence of our present charter, that interpretation shall always be applied which shall be deemed more beneficial, profitable and favorable to the said baron of Baltimore, his heirs and assigns; any statute, act, ordinance, provision or proclamation to the contrary notwithstanding."

VIII.

I have been thus full and particular in my quotations from this celebrated instrument creating and constituting the province of Maryland under the dominion and proprietaryship of Lord Baltimore, because these quotations were deemed requisite to clearly set forth and illustrate the nature, character, rights and jurisdiction of that dominion and proprietaryship, both as to territory and government, held and exercised by him and his heirs without let or hindrance, within the province from its settlement to the declaration of independence, interrupted only by two periods of interregnum, brought about by violence and disorder, and which ceased with the cessation of that violence and disorder. These rights and jurisdictions bear materially on the question which meets us on the threshold of this case, viz., in whom was the title to lands covered by navigable waters in the province; in Lord Baltimore as an incident of his political authority and quasi-sovereignty; or in the Lord Proprietary *as the owner of all the lands, water, rivers, bays, etc., within the limits of his grant, in fee simple, with full power of disposition?*

Before entering on the question of the title to the soil or bed of the Potomac River, as between the parties here, the United States and these appellants, it may be as well here to meet and briefly discuss the preliminary question as to who had the title to that soil or bed originally sued before either the State of Maryland or the United States, as its grantee, made any claim to it; indeed, before either of those governments were in being—that is, who had the title thereto as between the grantee in the Baltimore charter and the grantees in the Culpeper patent of the Northern Neck of Virginia? This question has a very

important bearing in future aspects of the case. For many years after the settlement of Maryland this was one of the subjects of controversy between Virginia and the Lord Proprietary of Maryland. Lord Baltimore, and Maryland subsequently, contended that the call and the line as laid down in the fifth line required to gratify them the whole of the Potomac River from bank to bank and from its source to its mouth, and the underlying soil or bed of that river. The language of the 11th section of the Maryland charter in describing this fifth line is as follows: "*Thence verging on the south into the farther bank of the said river and following the same on the west and south into a certain place called Cinquack, situate near the mouth of the said river, where it disembogues into the aforesaid bay of Chesapeake and thence*," etc. "The place," denominated "Cinquaek," is Smith's Point, on the south or Virginia bank of the Potomac River. It is quite clear from this description that the south or the Virginia bank of the river from its source to its mouth at high-water mark could alone gratify this call and answer this line, and is therefore the southern boundary of the Province of Maryland.

While the Lords Baltimore, and the State of Maryland on succeeding to their authority, constantly asserted this title to the whole river from bank to bank and gave patents for islands in the river, Virginia from time to time controverted this claim, but never undertook to make any grants of such islands.

The claim of title to the whole of the Potomac River by the State of Maryland has been sustained by the uninterrupted practice of the land office of that State from the earliest times; by the decisions of the Maryland courts:

Binney's case, 2 Bland, Chancery, Dec. 485.
O'Neal vs. Va. Bridge Co., 18 Md., Reports 1.

In R. R. & Bridge Co. vs. District of Columbia 1, Mackey R, 217, this question came for consideration before a tribunal outside of the State, and the learned Judge (Hagner) held that the charter of the 20th of Nov., 1632, gave to the grantee

in that instrument the whole river from bank to bank and pointed out a very strong argument in favor of that construction drawn from the Latin terms in which that fifth line is desscribed in the original charter. (See the opinion of Justice Hagner in the decision of the Court below in the case at bar, Record, Vol. VII, pages 2476 78, where this question is fully discussed. Howard vs. Ingersoll, 13 How., 381.)

In 1785 the two States—Maryland and Virginia—entered into an agreement as to the qualified use in common of the Potomac river for certain purposes of fishing and commerce by the citizens of both States. In 1877 the controversy was finally adjusted by an agreement between the two States to refer it to a commission composed of Hon. Jeremiah S. Black, Hon. James E. Beck, and Charles J. Jenkins, of Georgia. A majority of the arbitrators, Messrs. Black and Jenkins, decided in favor of Maryland's title to the bed of the whole river to low-water mark, it being held that Maryland, by the agreement of 1785, had yielded to Virginia the part of the river on the south side or bank, between high and low-water mark. (See this award Record, Vol. VII, page 2124.) This agreement of 1785, it may be added, was the initial step to the formation of the Union.

Under such a state of facts, and with these decisions of Courts of law and awards of arbitrators, it is not conceived how the learned counsel of the heirs of John Marshall can support their contention that they have acquired title to the bed of the Potomac River by and through the grant of either of Charles II to the Earl of St. Albans and others in 1660, twenty-eight years after the grant of the Province of Maryland to Cecilius Calvert by Charles I in 1632, or by the confirmations grant of James II to Thomas Lord Culpeper in 1688, fifty-six years after the Maryland charter; even conceding (what is denied, however,) that the terms of the two last mentioned grants actually embraced the bed or soil of the Potomac.

It is attempted, however, as I understand by the learned counsel of the heirs of John Marshall, to support this contention.

1. By asserting the invalidity of the judgment of the King's Bench in vacating the charter of the London Company in 1624, and, therefore, the invalidity of the Maryland charter. I cannot see how this contention, were it maintainable, helps the case of John Marshall's heirs, since, if that point could be sustained, it would necessarily work the destruction of the St. Albans-Culpeper-Fairfax grant of the Northern Neck of Virginia, which was equally with the Baltimore patent, on that theory, an invasion of the chartered rights of the old London Company.

2. On the ground that by what is known in the history of the Province of Maryland as "The Protestant Revolution," and the recognition of the result of the revolution by the English monarchs in 1689, on the accession of William and Mary to the crown of Great Britain, Lord Baltimore's title was forfeited to the crown, and this forfeiture enured to the benefit of the later charters as to subjects-matter of grants common to both.

The answer to this proposition will be given in full in a subsequent part of this brief, in connection with another point to be discussed, but it may be as well to say right here that the political movement of 1689, which deprived for a time, and very unjustly deprived, Lord Baltimore of his political and governmental authority, never affected or was held to affect in the slightest degree his rights of property. He continued to hold and exercise all these rights as Lord Proprietary and owner of the soil of the Province in as ample and effectual a manner and without question from any quarter either in England or in the Province, as he did before he was stripped of his political power, and as he did after he was restored to that political power and jurisdiction, on his (Charles III Lord Proprietary) conforming, in 1716, to the tenets of the Church of England. (See Kilty's Land Holders' Assistant, I. Kelty's Statutes, Scharf's Hist. of Md.)

3. It is contended, as I understand (it was in behalf of these heirs of John Marshall in the court below), that, if the confiscation acts of Maryland in 1780 worked a forfeiture of the title of Henry Harford, the last Lord Proprietary of Maryland, and to

his lands in the Province, that forfeiture enured to the benefit of the outstanding junior Fairfax patent. (Still proceeding on the theory that that Culpeper patent actually embraced the Potomac River.) Lord Fairfax was, at the time of his death, December, 1781, a citizen of Virginia, ~~when his estates were confiscated.~~ (See Fairfax's Devisee vs. Hunters's Lessee, 7 Cranch, 621.) I shall leave the further exposition and elaboration of this third point to the brief of my learned brothers, the counsel of the heirs of John Marshall.

IX.

First Proposition on this Statement of Facts.

These respondents will contend that the Lord Proprietary of Maryland. his heirs and assigns, under the fourth and fifth sections of the charter, held and owned as his property and estate, of his *demesne* or *jus privatum*, all the lands covered by navigable waters within his territorial limits, subject only to the public rights or servitudes of commerce and navigation and fishing; and that he had the right to dispose of such lands by grant as of the dry land, subject to these restrictions; and as a necessary corollary to this proposition, that if at any time by reason of natural or artificial means or agencies these lands cease to be covered by navigable waters, and thereby became freed and discharged from these servitudes or easements, *co instanti* by operation of law and as an incident and consequence of such ownership, the possession following the title, they became as absolutely and fully his as the fast land within his limits.

In the first place let us look to the charter. The fourth section gives to the Proprietary "*all and singular the ports, harbors, bays, rivers and straits*," and repeats the terms "all *the soil, plains*, mountains, woods, marshes, lakes, *rivers, bays and straits* * * * within the metes, bounds and limits" of his charter. "To Have and to Hold" continues the fourth section, "Possess and Enjoy * * * and all other the premises unto him, his heirs and assigns, to his, her and their sole behoof and use forever."

These sections are susceptible, we submit, of but one construction. All the ancient and consecrated terms and formulas by which the highest estate known to the common law is conferred, are employed. All the words of the conveyancer's vocabulary descriptive of things real or savoring of the realty, are used. These sections import nothing other than an absolute grant in fee simple of all the things mentioned, " Of the *rivers, bays, lakes and straits, and the soils under them*, as of the woods, the plains, the marshes and the mountains." If the former have not been granted in fee simple and full and absolute property, the latter have not been so granted. If he could not grant out the one, he could not grant out the other; and the Lord Baltimore would have taken, under this construction, nothing by his charter but the parchment on which it was written. His grant would have been from the beginning disemboweled and empty. He would have been a Proprietary without an acre and a ruler without a subject. For it is impossible to admit the distinction, which in some cases it has been attempted to set: *i. e.*, that the Proprietary held the lands, etc., as absolute owner, in fee simple, but the rivers, bays and waters, and the soils under them, he held as trustee for the public, without doing manifest violence to the letter and spirit of the charter, and shaking every title in the State.

And this obvious and imperative construction is strengthened by these additional considerations:

1. The rule of interpetation to be applied to the charter as prescribed in the twentieth section and in derogation of the rule of the common law in interpreting royal grants generally, requires this construction as most favorable to the grantee.

2. The charter is, and was, evidently intended to be ample and generous in its concessions of territory and of dominion. It was one instance of the bounty of kings. If any grant of right or power was intended to be qualified, the qualification is specifically made in terms. See the fifth, eighth, tenth, sixteenth and twenty-second sections for instances of these qualifications, the sixteenth section especially,

wherein there is a reservation of the right to all subjects of the King, of his kingdom of England and Ireland, to fish and cure fish in the waters of the Province. Without this express reservation these subjects would have been excluded from the right by the full and explicit grants of territory and waters in the first clauses of that section and in other sections, as Daniel Dulany contended. See opinion of of that eminent lawyer in appendix to 1 Har. and McHenry, 564. The opinion of Daniel Dulany was of authority even in Westminister Hall in his day, and his argument against Parliamentary taxation of the colonies, especially of Maryland, under the 20th section of the Baltimore charter, carried such weight with the ministry, that it contributed to a repeal of the Stamp Act in 1765.

3. Under the charter the grantee, his heirs and assigns fill a double role and are clothed with a dual capacity. He is made absolute lord and county palatin, and in such character is clothed with ample powers and prerogatives of jurisdiction and government. He is also made the absolute Proprietary of all the lands, marshes, rivers, mountains, etc., within the limits of the territory which in the third section is given and granted to him, his heirs and assigns with definite boundaries.

The dual capacity is recognized throughout the charter: wherever there are grants of land or territory the grants are expressed to be given "to him, his heirs or assigns." Wherever there are grants of jurisdiction and power, they are to him and his heirs.

4. The third section of the charter says "that we * * * *have given, granted and confirmed, and by this our present charter for us, our heirs and successors do give, grant and confirm unto the said Cecilius Calvert, baron of Baltimore, his heirs and assigns*, all that peninsula, etc," marking it out by boundaries.

5. The fourth section begins with this language. "Also we do grant and likewise confirm unto the said baron of Baltimore, his heirs and assigns, all islands and islets * * * with all and singular the *ports, harbors, bays, rivers and straits belonging*

to the regions or islands aforesaid, and all *the soil, plains, woods, mountains, marshes, lakes, rivers, bays and straits* situate or *being within* the metes, bounds and limits aforesaid, with fishing of every kind" * * * and furthermore, all and singular such ample rights, royalties, franchises * * * to be had, exercised, used and enjoyed, as any Bishop of Durham in our kingdom of England, hath, had, used and enjoyed, or of right, could or ought to have, hold, use and enjoy.

Blackstone, vol. 1, page 117, tells us what those royalties, etc., were. "The owners of these counties palatine had *jura regalia* as fully as the King hath in his palace *regalem potestatum in omnibus.* They might pardon treasons, murders and felonies, they appointed all judges, justices of the peace; all offenses were said to be done against *their* peace, and not *contra pacem domini regis.* And he gives historically the reasons of the grant of such royal rights and privileges (so like, he observed, to the regal independent jurisdictions usurped by the great barons on the continent), that they were granted to these counties of Chester and Durham, and their owners, the earls of Chester and the bishops of Durham, because they bordered respectively on the then inimical countries of Wales and Scotland, that the inhabitants might have justice administered without going out of their counties, and thus leaving them open to the invader, and the owners be encouraged by such large jurisdiction to greater watchfulness. All of which reasons would apply with force in the establishment of a province for the settlement of white inhabitants amidst a savage people. And here let it be noted, in answer to what the learned counsel of the government says on the point of *jura regalia.* They contend that the ownership of Lord Baltimore of the lands embraced in his grant or his title to such lands was part and parcel of the *jura regalia* conferred upon him as the Lord Proprietary of Maryland, and was lost and extinguished in the loss and extinction of his other *jura regalia* by force and effect of the Revolution or change in government, brought about by that event. Now in the enumeration of these *jura regalia* or royal jurisdictions

and privileges of the county palatine, not a word is said or an idea intimated that the ownership of land or title to lands were among the *jura regalia* enjoyed by the owners of these counties, the Earls of Chester and the Bishops of Durham. In point of fact, by subsequent legislation, the parliament of Great Britain, by 27, Hen. VIII and 14 Elizabeth, abolished all the *jura regalia* of these counties. But whoever thought or contended that such extinction carried with it the titles to the lands and estates of the Earl of Chester or the Bishop of Durham? In fact, no authority can be found or given for classing ownership or title to lands and effect under absolute grants of such lands as among the incidents to *jura regalia*, until some such language was used in Martin vs. Waddel, 16 Peters, 367, which was used inadvertently, it seems to me, and, at most, can only be regarded as *obiter dictum*. That case and its authority in the case at bar will be more fully considered later on.

6. The fifth section of the charter declares "him (the now Baron of Baltimore), his heirs, the true and absolute lords and proprietaries of the region aforesaid, and all other the premises, to have, hold, possess and enjoy the aforesaid region islands, islets and other the premises unto him * * * his heirs and assigns, to the sole use and behoof of him, the Baron of Baltimore, his heirs and assigns, forever. To hold of as our heirs and successors, kings of England; as of our Castle of Windsor *in free and common socage, by fealty only for all services and not in capite nor by knight's service*, yielding two Indian arrows yearly and one-fifth part of all gold and silver."

The grantee was not to hold this great estate conferred upon him, "his heirs and assigns" by the bounty of a grateful King, as a *tenant-in-capite*, which though an honorable species of tenure, was highly onerous and burdensome by the duties and exactions it imposed upon the tenant; but by free and common socage, the freest and highest tenure one could hold in lands. By the 18th section the statute of *quio emptores* was dispensed with in the province, and the Lord Proprietary was clothed with the authority to make grants of lands, which should be holden of him immediately.

In Fairfax's devisee vs. Hunter, lessee, 7 Cranch 603, Story, J., speaking for this court and construing a charter, which, while it conferred no political or governmental power or jurisdiction whatever, did give full and ample grants of territory to the beneficiary, the grant by Charles II and James II to Lords Hoptin and Culpeper, (the one already referred to), (Record, vol. III, ~~Hayes~~, 1128, *et seq*) and which in the particular of describing such grants of land and territory is almost identical in terms with the Baltimore charter, says: "The royal charter expressly conveys all that entire track-territory and parcely land statute, etc., together with all woods, rivers, marshes, etc., to the grantees and their 'heirs and assigns,' to their only use and behalf," etc.

"*It is difficult to conceive terms more explicit than these to vest a title or interest in the soil itself. The land is given and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the dominium directum and title, the complete and absolute dominion in property, it will not be easy to fix on anything which shall constitute such dominion.*" In that case, it was contended by the counsel for Hunter's Lessee, that, as it was provided in that charter that the grantees should hold of the King as tenants *in capite*, the charter confined the rights granted to a mere authority to sell and alien, and conferred no direct ownership or absolute dominion, and that consequently on the occurrence of the revolution this authority became forfeited or passed to the State of Virginia. But the Supreme Court answered and effectually disposed of such pretensions. It is to be observed in this connection that the charter to Lord Baltimore would not have furnished any ground, even however flimsy, for such contention, for, in addition to other great points of difference, the grantee in his charter was declared *not* to hold *in capite*, but in free and common socage, and the great statute of *qui emptores* was declared not to be applicable to the Proprietary grants of land. * * *

"We are, therefore, satisfied," continues the Court, "*that by virtue of the charter and the intermediate grants*, Lord Fairfax, at

the time of his death, had *the absolute property of the soil of the land in controversy*, and the acts of ownership exercised by him over the whole waste and unappropriated lands, as stated in the case, *vested in him a complete seizure and possession thereof. Even if there had been no act of ownership*, we should have been of opinion, that as there was no adverse possession, and the land was waste and unappropriated, *the legal* seizure must be, on principle, considered as passing with the title." The Court, therefore, sustained the devise of Lord Fairfax of all of his estate and property in the Northern Neck of Virginia to his nephew, Denny Martin. The last paragraph of the decision bears with peculiar emphasis on another branch of this case to be subsequently treated—that of adverse possession by the government since the cession of the District of Columbia to the government by the State of Maryland.

In Howard vs. Ingersoll, 13 Howard, 400, to which I have already referred, the Supreme Court recognizes the distinction between the royal and proprietary governments, as also the distinction in the latter class of colonial establishments between the grant to the Proprietary of political and civil power and jurisdiction and the grant of the land to the Proprietary.

X.

This Distinction of the Proprietary's Two Capacities, as Lord of the Province, and as Owner of the Soil, Is Recognized by all the Historians of Maryland.

4. Twice during the provincial history of Maryland the Lords Baltimore were stripped of all their political authority and right of government; once in 1652, during the protectorate of Cromwell by the Puritans, to whom, on their petition, the Proprietary had given, in 1642, settlements on the Severn; and again, in 1689, on the accession of William and Mary to the crown of England. The first usurpation was of brief duration, the second continued for about twenty-five years, yet during that period, though all the rights of government given

by the charter to Lord Baltimore had been seized by the crown and royal governors were appointed, his Proprietary rights as owner of the soil and land were not invaded or infringed upon. The Land Office, whence all patents for lands were issued, remained under his undisputed control. He appointed his surveyors-general, agents, receivers and other officers connected with the administration of his vast estate.

See Bozman's Hist. of Maryland, p. 409.
McMahon's Hist. of Maryland, pp. 246, 247.

As the author of this work, Hon. John V. L. McMahon was in his day one of the most eminent lawyers of Maryland, his statement is of peculiar weight and consideration. He says, speaking of this revolution of 1690 (known in the history of the province as "the Protestant Revolution," and by which the Lord Proprietary was deprived of his ~~promotion~~ jurisdiction and political authority for twenty-five years. The next aim of the Assembly (composed of the enemies of Lord Baltimore) *was at the proprietary rights* and revenues which were *not incident to the government of the province, and were not swallowed up by the revolution. The rights of the* proprietary under *the charter have already been distributed into two general classes, one of which embraces his rights of jurisdiction and the other his rights of soil, as the original owner of the lands of the province. The latter,* being rights *private and personal in their nature and emoluments, were not of course destroyed by a mere revolution of the government * * * he was still owner of all vacant lands.*

He claimed, therefore, his quit rents, port duties. "In this," continues the same eminent authority, "he was sustained by the Crown. Whatever William's policy as to the disposition of the government, he did not lose sight of justice in his proceedings *as to the private rights* of the proprietary." During the pendency of this struggle between the revolutionists and Lord Baltimore as to his proprietary rights in the land of the province, Lord Baltimore closed the land office in the province, and not a single grant or patent for land was issued, until its settlement in

his favor by William III, in 1694. He reopened the land office and patents and warrants for land continued to be issued as before, although all the extensive political power and authority conferred upon him by the charter were taken from him and put in the hands of the King. This power and authority was subsequently, in 1716, restored to his successor, Charles Lord Baltimore, on his conforming to the Church of England. (McSherry Hist. of Md., page 96.)

History of Maryland, by Wm. Hand Browne, in "American Commonwealth" series, page 154, 155, which says, treating of the same event, the Protestant revolution, "A distinction was drawn between the Proprietary's *sovereign* and his *personal* rights. He had no longer any share in the government; public officers were appointed by the Crown or the delegates, laws received royal confirmation, and processes ran the name of William and Mary. But Baltimore's *territorial rights were respected —his quit rents and his ownership of vacant lands.* * * * *William coveted Baltimore's authority, but he did not covet his private property.*"

Bancroft, Vol. I, page 262, in speaking of Cromwell's treatment of Baltimore during the Puritan Rebellion in the province in 1650–52, says of the Lord Proprietary: "On the one hand he respected *the rights of property of Lord Baltimore;* on the other, he *protected his own political partizans, corresponded with his commissioners and expressed no displeasure at their exercise of power.*" The Puritans, who had been driven out of Virginia in 1645, had received a large grant of lands on the Severn from Leonard Calvert, the Proprietary's brother and Governor. They availed themselves of the violent charges in England, the execution of Charles I and Cromwell's seizure of the supreme power to get up a little provincial revolution on their own account. They expelled the Proprietary's government, made war on the Governor and attempted to deprive Baltimore of his charter. Cromwell sustained for a while their seizure of the political power of the Proprietary, but refused to take away his rights of property in the province, which the Puritans made efforts to do.

Kilty's Land-Holders' Assistant, page 133, note, page 162 and note.

This work, prepared by John Kilty, Registrar of the Land Office, is of high authority on every question connected with the land laws of our State. It is a sort of Maryland domesday book.

Nor are we without express decisions of our courts on this point.

In Baltimore vs. McKim, 3 Bland Chan., Dec. 455, Chancellor Bland says: "The Land Office has always been, as it now is, the general market in which all public lands have been offered for sale and into which anyone capable of holding real estate might come and purchase according to the prescribed rules and terms of sale. This office, so peculiar in its nature, evidently originated from the circumstances *of the right of soil of the whole country having been vested exclusively in the Lord Proprietary as a part of his private estate*" * * * The charter of Maryland not only vested the right of soil in the Lord Proprietary, but it also clothed him with certain political and regal powers within his province.

In Howard vs. Moale, 2 Harris and Johnson, 249, the Court of Appeals says distinctly that *jura regalia* as attached to the person of the King in England never did attach the Lord Proprietary of Maryland. The Proprietary *held the dominion of Maryland and property of the soil which he could dispose of in the same manner as any other person, and subject to the same legal and equitable rights as in the hands of any other person.* Whatever *jura regalia* or sovereign rights he enjoyed were specifically given him by other sections.

In Kelly vs. Greenfield, 2 Har. and McHenry, 121, it was held that under the charter of Maryland the Proprietary was not entitled to the benefit of the prerogative maxim of *nullum tempus occurrit regi.*

In Calvert vs. Eden, 2 Har. and McHenry, page 279, it was held:

1. That the Lord Proprietary could sue and be sued in his own courts in Maryland, though the judges thereof were appointed by him and held office during his pleasure.

2. That though the statute De Donis, 1320, 1st st. 1, chapter 1, was in force in Maryland, the Proprietary of the province could suffer a common recovery and thus bar an entail in his own courts. *If the Proprietary held title to his lands as an incident only to his royal rights and jurisdiction, no recovery could lie against him.* His land could not have been entailed. In a word, no authority, legal or historical, can be found in Maryland to give countenance and support to the contention of the counsel for United States Government in this case, which contention is, however, necessary to their case, an indispensable foundation for it, indeed, that the ownership and title of the Lords Proprietary in the territory and soil of his province, and the beds of its waters were but incidental to his authority as a quasi sovereign under his charter, the loss and extinction of which political or sovereign authority at the Revolution carried that ownership and title with it. On the contrary, all the authorities are directly and explicitly against such contention.

XI.

Title to Lands Under the Potomac River.

But it may be said that while it is or may be true that the Lord Proprietary of Maryland had full and perfect title to the lands and territory embraced within his charter limits, so that he could, as he did, dispose of them absolutely, this title did not cover or extend to the submerged lands, over which the tide ebbed and flowed. This raises two questions :

1. Can the King grant lands over which the tide ebbs and flows ?

2. Did the King in his charter to Cecilius Calvert make such grant ?

It may be as well first, to consider and dispose of the subject involved in the second question, i. e.: Did the King make a grant of lands underlying the waters within the limits of Baltimore's charter? To answer this it is only necessary to look at the charter; the deed to this vast estate given therein to the grantee.

a. By Section III, the grantor declares "we have given, granted and confirmed, and by this, our present charter, do give, grant and confirm to the aforesaid Cecilius, his heirs and assigns, all that part of the peninsula," etc., marking it out by metes and bounds.

b. By Section IV, the grantor declares that "Also we do grant and likewise confirm unto the said baron of Baltimore, his heirs and assigns, all islands and islets within the limits aforesaid. * * * With all and singluar *the ports, harbors, bays, rivers and straits belonging to the region or islands aforesaid, and all the soil, plains, woods, mountains, marshes, lakes, rivers, bays and straits* situate or being within the limits aforesaid."

c. By Section V, the baron of Baltimore, his heirs, is made and constitued the *true and absolute* Lord Proprietary of the region aforesaid and of all other the premises "to have, hold, possess and enjoy the aforesaid regions, islands, islets *and other the premises* unto the said baron of Baltimore, and his heirs and assigns, to the sole and proper use and behoof of him, his heirs and assigns, forever."

Certainly more comprehensive language could not be used. One can apply to this grant the language of Justice Story in Fairfax Devisee vs. Hunter's Lessee, 7 Cranch, 618: "It is difficult to conceive terms more explicit than these to vest a title and interest in the soil;" and the language of Justice Thompson also in his able dissenting opinion in Martin vs. Waddell, 16 Peters, 428: "If these terms," after quoting them from the charter of Charles II to the Duke of York, his brother, of the colony of New Jersey, "are not broad enough to include everything susceptible of being conveyed, it is difficult to conceive what others could be employed."

And this language was used in respect of charters not so full and particular in its descriptive terminology as the Baltimore charter. Blackstone says, Vol, II, pages 17–18, speaking of the comprehensive character of the word land in the English law, says: "If a man grants all his lands, he thereby grants all his mines of metal, fossils, his woods, his *waters* and houses, as well as his fields and meadows by the name of land, which is *nomen generalissimum* every thing territorial will pass." But the draftsman of this charter was not content to repose his grant on this *nomen generalissimum* but *ex industria*, and to leave no room for a construction which could possibly exclude anything, goes into a most extensive enumeration of particulars and repeats "bays, lakes, rivers, straits, ports, harbors and soil." It is impossible to look at the charter and come to any other conclusion than the beds of all navigable waters, "bays, lakes and rivers and straits," were granted to the Proprietary of Maryland, unless, indeed, under the laws of England the King was debarred from making a grant of the beds of navigable waters, where the tide ebbed and flowed. And this brings us to the consideration of the first question.

XII.

CAN THE KING OF ENGLAND GRANT AND CONVEY A VALID TITLE TO LANDS UNDER NAVIGABLE WATERS WHEN THE TIDE EBBS AND FLOWS? AND OUR ANSWER TO THAT QUESTION IS: HE CAN AND HAS DONE SO IN THE COURSE OF THIS CHARTER AS WELL AS IN THE COURSE OF OTHERS.

In making this answer, it will be incumbent upon these respondents to establish two propositions.

1. The King can make a valid grant of land, flowed over by the tide, but *sub modo*, that is subject to servitudes or easements *in* the public, of fishing, navigation and commerce.

2. That the grantee of the King can also make grants of such submerged land, but subject the same public servitudes or easements.

3. That this title is in itself perfect, but in abeyance and incapable of user so long as the lands are flowed over by the tides in their ebb and flow, and are therefore subject to these public servitudes.

There is such a thing known to the common law as a title "in abeyance."

"The fee simple or inheritance," says Blackstone, book II, pages 107-108, "of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it * * * yet sometimes the fee may be in abeyance, that is, (as the word signifies) in expectation, remembrance or contemplation of law, there being no person in *esse* in whom it can vest or abide; though the law considers it as always potentially existing, and ready to vest whenever the proper owner appears." And the learned author gives several instances in illustration of his text. The inheritance or remembrance in the cases he suggests, are, said he, in abeyance or *in nubibus*, or *in gremio legis*. Mr. Fearne in his essay on Contingent-Remainders has, it is true, vigorously, and perhaps successfully attacked this doctrine of title in abeyance, *in nubibus*, of the learned commentator, and shown that in all the cases put by him, save one perhaps, the title does exist in some one, who when the occasion arises for its use can assert it with success.

But if there be such thing as a title to land *in. nubibus*, which descends on the proper owner when he appears or the occasion arises which enables him to assert it, I do not see why a title to land may not be *sub aqua* and rise with the land, when by some natural or artificial means that land arises out of the water, and shaking off the wet garniture of these servitudes and easements, which pass away with the element in which alone they exist, and can be claimed and exercised, becomes dry land. And this brings us to the third proposition under this head.

3. That when by some artificial means, or change by some convulsion, the land which was flowed over by the tides becomes firm and fast land, the right to possession or use becomes full

and perfect in the owner of the title—and not till then. And this is the case of the lands in question, constituting the Potomac Flats, which the Government of the United States in the exercise of its rights of eminent domain, now seeks for the first time to reclaim and make firm and fast land for public use, but which we submit it cannot do, without just compensation to these appellants, respondents below, the owners of the title to these lands.

On the first point or proposition we have express decisions of the courts of Maryland, from which the United States acquired the territory of the District of Columbia. In Brown vs. Kennedy, 5 H. and I., 196, this very question whether the beds and soils of navigable waters were included in the grant from the King to Lord Baltimore, and whether the proprietary could lawfully grant out such lands to others, or whether such lands constituted a part of the *jura regalia* of the King and of the Proprietary, and were therefore inalienable, was considered by the Court of Appals of Maryland, and that court held unanimously:

1. That the King of England has a right to grant land covered by navigable waters subject to the right of the public to fish in and navigate them.

2. That the former proprietors of Maryland acquired the same right of disposing of land covered by navigable waters within the Province of Maryland subject to the like restriction under the charter by which the Province was granted them by the King as the King had prior to the charter. The judges differed as to the legal effect of certain conveyances made subsequenty to the first grant of the Proprietary, but in these two propositions they were unanimous. Buchanan, J., in delivering the opinion of the Court, says: "*The language of this fourth section* (above quoted) *of the charter is too plain and explicit to admit of any doubt, and is strengthened rather than weakened by the saving in the sixteenth section* (reserving rights of fishing to all the King's subjects), *and clearly passed the property in the soil covered by any of the waters within the limits of the charter to the*

Lord Proprietor, who, in becoming owner of the soil subject to the common right of fishing and navigation had full power and authority to dispose of it." This case is interesting, and resembles in its leading features the case at bar. Its doctrines have been confirmed by many subsequent decisions of the Court of Appeals, and have received the sanction of other judicial tribunals in this country of high authority. The case was decided in 1821, and was followed some years afterwards in quick succession by the cases of

Wilson vs. Inloes, 11 G. and J., 359.
Casey vs. Inloes, 1 Gill, 512.
Wilson vs. Inloes, 6 Gill, 121.
Hammond vs. Inloes, 4 Md., 139.
Peterkin vs. Inloes, 4 Md., 175.

These cases involved the titles to a large and very valuable body of land (estimated to have been worth about $3,000,000) fronting on the harbor of Baltimore, and a large part of which had been made at various times out of the waters of the Patapsco River. Of these land grants had been made by the Proprietary, and under the Act of 1745, chapter 9, section 10, riparian owners had filled up and reclaimed a part. Many grave and important questions arose in these cases—the rights of riparian owners, the legality of grants of land under navigable waters, titles by senior or junior patents, limitations, adverse possession, accretions, laches, escheats, etc.—some of the very questions involved in the case at the bar, and on them these cases with Brown vs. Kennedy are a veritable mine of learning and authority. All these questions received an exhaustive discussion by the eminent counsel engaged in the cases, and the most careful consideration of the Court and the decisions which the Court of Appeals reached in them all confirmed and sustained the principles announced in Brown vs. Kennedy. I particularly call attention to what that Court said in 11 G. and J., 360; in Casey vs. Inloes, 1 Gill, 512; in 6 Gill, 169, 170. In this last case Dorsey delivered the opinion of the

Court, which was, like all his opinions, thorough and exhaustive of the subject treated. And this doctrine continued to be recognized and acted upon as what I may term the common law of Maryland until the passage of the Act of 1862, forbidding in future all grants of land under navigable waters within the limits of the State.

In 1853, in Hammond, Lessee, vs. Inloes, 4 Md., 138, and Peterkin's Lessee vs. Same, Ibid 175, the Court of Appeals, then recently created under the new Constitution of 1851, was called upon by the able and persistent counsel representing the plaintiffs to review the determination of its predecessor on the questions raised in these cases. But in two very able opinions delivered by Tuck, J., that tribunal affirmed unanimously the decisions of the old court, to the same effect ~~as~~ are the decisions of the Court of Chancery of Maryland.

In Baltimore vs. McKim 3, Bland, ch. Dec. 459-60, the learned Chancellor Bland after stating that at one time an opinion seemed to be entertained in the Land Office (of Md.) that a patent to lands under navigable waters gave no title at most no further than to low water mark, says, "upon a more careful consideration of the whole question, however, it has been *finally settled that the bed of any of the navigable waters of the State may be granted and will pass if distinctly comprehended* within the terms of an ordinary patent, issuing from the land office, subject only to these existing public uses of navigation, fishing, etc., which cannot be hindered or impaired by the patentee or those claiming under him." And he refers to several acts of the Maryland Legislature providing for exclusive titles to ~~planters'~~ the beds in navigable waters.

At a later date, in the same court, Chancellor Johnson, in Chapman vs. Hoskins, 2 Md. Chan., Dec. 289, held the same view. A certificate for flats in the Potomac River, about twenty miles below Washington City, had been issued out of the Land Office to one Hoskins. A caveat was filed to the certificate on the ground that it was a part of Craney Island, in that river, which had been patented to the ancestor of the caveator more

than a hundred years before, the land certified being, it was claimed, formed by washings from Craney Island. There was no question that the certificate was for land over which the tide ebbed and flowed. That fact was admitted and was urged as an objection to it, and thus the right to grant such lands was sharply presented. While refusing the patent, on the ground made out by the caveator, Chapman, that the claim was for land which was either an extension of his (the caveator's) land, or formed by washings therefrom, the Chancellor said in answer to one of the points made by counsel for caveator, that the certificate of Hoskins was submerged land under water when the tides were coming in or going out, "since the decision of the Court of Appeals of this State in Brown vs. Kennedy, in 5 H. and J. 195, it appears to me quite impossible to deny that it is competent to the State *to grant land covered by navigable waters, subject to the right of the public to fish in and navigate* them. The point, not only as I understand it was in that case, but every judge who sat in the cause concurred in the opinion so far as this question is concerned, though upon other points some disagreement seems to have existed, and I strongly incline to think that the doubts which have been expressed upon various occasions, and the apparent conflict and difficulties which embarrass the subject, proceed from the cause referred to by the judge who delivered the majority opinion—*that is, inattention to the distinction between the power to grant the exclusive privilege of fishing in navigable water, in violation of the common piscatorial right, and the power of granting the soil, aqua co-operta, subject to the common use.*

It is one thing to grant the soil covered by navigable waters of a river, subject to the right of the public to fish and navigate thereon, and another and a very different thing to grant to an individual the exclusive right of fishing therein; and it was against the authority of the crown to grant this latter right, that the provision in magna charta, to which reference has been made, was directed.

We are clearly entitled upon these cases to affirm that if uninterrupted chain of decisions, both of the Court of Appeals

and of the High Court of Chancery of Maryland, can be said to be of authority on any question of law peculiarly within ~~its~~ their province and competency to settle, viz., a question growing out of the charter of the Province, and construing that charter, affecting land titles in that State and involving a rule of property of deep interest and magnitude, these propositions may be regarded, according to the deliberate and well considered decisions of those tribunals as undoubted law.

1. That by the common law it is competent for the sovereign power to make valid grants of lands covered by navigable waters, subject to the public rights or easements of fishing for floating fish, commerce and navigation.

2, That the King of England, in his charter to the Lord Proprietary of Maryland, granted to him, his heirs and assigns, all the lands, beds or soils under all the navigable waters within the limits of his province, subject to the same public rights or easements of fishing and navigation and commerce.

3. That the Lord Proprietary has the same right the King had to make valid grants of such lands to be held by his grantees, subject to the same restrictions.

4, That the title the grantees take in such lands, whether from the Lord Proprietary directly or mediately, is an absolute property or fee simple title, subject to such easements of fishing and navigation; and accordingly that when by any natural or artificial means or agencies such lands cease to be covered with navigable waters and these easements therefore cease, *eo instanti seisin*, and possession following the title, are by operation of law and under the charter drawn to the Proprietary, his heirs and assigns.

XIII.

The Title to the Beds or Soil of Navigable Waters, Subject to the Ebb and Flow of Tides — Considered with Reference to the Common Law, the Decisions of the Courts of Other States and the Decisions of the Federal Tribunals.

By the common law, property in the soil of all arms of the sea, bays, estuaries and of rivers in which the tides flowed was

in the King as part of his *jus privatum*, subject to the public and common rights—fishing, commerce and navigation. Indeed, before he was restrained by Magna Charta the King had, and exercised, the right of granting right of private or several fishery in these waters. (See Hale's de Jure Maris, Ch. 4, pp. 10, 11, 17; Hargrave's Law Tracts: Lord Mansfield in Carter vs. Murcot, 4 Burr., 2164, and the case Attorney-General vs. Burridge, 10; Price, 350.) Blackstone says (Book II, Chap. 2, page 19): "*That by a grant of water* nothing will pass but the right of fishing," which shows that the waters of arms of the sea and navigable rivers *per se* are incapable of being made the subject of property rights for obvious natural and physical reasons, almost as much so as the "circumambient air," for, like that element, it is fugitive and evanishing, but a *use* in it—an easement—is another thing, and these uses or easements are of public and common right and cannot be taken away or infringed upon by the King's grant; but the soil under these waters and subject to these uses and easements do lie within the King's grant.

In Com. vs. Charlestown, 1 Pick., 180, the Supreme Court of Massachusetts says that "by common law the rights of the soil between high and low water mark *and in all arms of the sea, coves and creeks where the tide ebbs and flows are property of the King, unless appropriated to some subject by grant prescription, which presupposes a grant;* that by grant of Charles I (to the Plymouth Co. in 1628) all right *in the shore and waters of the sea was transferred to the Company which undertook the settlement of the colony, giving them absolute property in the* land within the limits, the power of making laws and full dominion *over all the ports, rivers, creeks and harbors in as full and complete manner as they were held* by the crown of England.

In Com. vs. Alger, 7 Cush. 76, Chief Justice Shaw, after a thorough review of all the English authorities on this subject, says, page 81 of the report of the case: "It therefore appears upon the authority of Lord Hale, that in regards to the sea-shore, arms of the sea and navigable rivers, the King stood in

two capacities, holding a *jus privatum* or right of property in the soil, and also a *jus publicum* or right as sovereign under his royal power or authority to regulate and govern for the common use and benefit of all persons for the purposes of navigation. The truth of these positions has been recognized and affirmed in cases comparatively recent by the highest tribunals of England, the Court of Exchequer and the House of Lords." It was held by him, therefore, in this case (Com. vs. Alger), that the former, that is the private property in the beds and soils of navigable waters, lie in grant subject to the *jus publicum* or common right of the public for purposes of commerce and navigation in the unobstructed use of the waters that flowed over them.

In Nichols vs. Boston, 98 Mass. 41, Justice Gray delivering the opinion of the court, said: "By the common law of England the King held all the land covered by tidewater and all ports, harbors and arms of the sea within the realm; holding both the *jus privatum* or private property in the soil which he might grant to a subject; and the *jus publicum* or prerogative rights for the common use and benefit of all subjects, for the purpose of navigation and commerce, which could not be granted away to the injury of the common right of navigation without an act of Parliament, but it might be determined by a writ *ad quod damnum* that such grant would cause no injury."

In People vs. N. Y. & Staten Island Ferry Co., decided in 1877, 68 N. Y. R., 71, the same doctrine was held: a similar derivation of title in the navigable waters of the State from the King of England (the Dongan Charter from James II., in 1686) the same distinction between ownership in the soil of navigable water as a part of the *jus privatum*, and therefore lying in grant, and the *jus publicum* in the waters themselves, which, in the interest of commerce and navigation, could not be granted. In Langdon vs. Mayor et al., 98 N. Y. R., 93 N. Y. R. (1883), the question of the ownership in the soil under navigable waters received a thorough and masterly discussion at the hands of

Earl J., who fully maintained, on principle and authority, the doctrines here contended for. See also Weber vs. Commissioners, 18 Wall., 66; McCready vs. Virginia, 94 U. S. R., 391.

In Stevens vs. Paterson & Newark R. R. 5, Brown 34, N. J. Law 532, it was held that all the navigable waters within the territorial limits of the State and the soil under such waters belong in actual propriety to the public, that the riparian owner by common law has peculiar rights in this public domain as incidents of his estate. * * * *The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark.*"

In Penn. R. R. vs New York & Long Branch R. R. 8, C. E. Green (23 N. J. Equity R.) 157. The Chancellor, Zabriskie, held "that the lands under water, including the shore on the tide waters of New Jersey, belong absolutely to the State, *which has the power to grant them free from the right of the riparian owner in them.*"

XIII.

The Decisions of the Supreme Court on this Subject of the Title to Lands Under Navigable Waters.

In the brief of the learned counsel for the Government in the Court below, as well as in the opinion of Judge Hagner—delivering the opinion of the Supreme Court of the District of Columbia, the cases of Illinois Central R. R. vs. Illinois 146, U. S. R. 387, and of Shively vs. Bowlby 152, U. S. R. 1, were quoted and relied upon to support the contention of the counsel and the opinion of the Court as delivered, to the effect, in contravention of the claim of these respondents, that the title to lands under waters subject to tidal flows, was in the King and in the States as successors to his rights as part of the *jus publicum* of the *jura regalia;* that such lands were held by him and his successors as trustees for the public, which had in the waters over them the rights of fishing and navigation, and that

such lands were therefore inalienable; from which position of the counsel and the Court it followed as a necessary consequence that the King in his charter to Lord Baltimore did not and could not grant any property in such lands to the grantee, and that the grantee could not make any grants of such lands to others.

We submit in answer to this that a full and thorough examination of these leading cases does not support the pretensions of our learned friends who represent the Government in the opinion of the Court below.

The first case arose out of an Act of the Legislature of Illinois. granting to the Illinois Central R. R. "all the right and title of the State of Illinois in and to the submerged constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central R. R. for the distance of one mile," and between certain lines mentioned. This gift of the State, or attempted gift, to a corporation of the bed of the lake to the extent of one mile from shore, and of great breadth, to enable it to fill it up and erect its tracks and structure on the land thus artificially made, and thus necessarily discharged from the public uses and easements of fishing and navigation in the waters over them, which, indeed, were *pro tanto* to the extent of the grant destroyed, was justly held to be beyond the competency of the Legislature, and, therefore, void. But this does not contravene our position, or nullify or defeat the claim of these appellants, which is that the title in lands and soil under tide waters is in the King as part of his *jus privatum*, subject to the public servitudes mentioned; which lands he can dispose of by grant, but still subject to these servitudes in the hands of his grantee, who can again dispose of them, subject to the same servitudes.

And so on *ad infinitum*, the grant always burthened with these servitudes until the lands, the subject of the grant, are made or become firm and fast land by some lawful artificial means, as for some public improvement, or by some natural

occurrence are recovered from the waters in which these servitudes are enjoyed or are exercised by the public ; and these servitudes thenceforth ceasing by the operation of these causes the lands are discharged from them, and the right of use and possession therein following, the title becomes vested in the owner of the title, *cessante ratione, cessat quoque lex*, for the servitude is not on the land, but on or in the waters. And to this effect Justice Field, in delivering the opinion of the Court, speaks in the forefront of the decision, page 335 : "It is," he says, "the settled law of this country that the ownership of and dominion and sovereignity over lands covered by tide waters within the lands of the several States, belong to the respective States within which they are found, *with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject* always to the paramount right of Congress to control *their navigation* so far as may be necessary for the regulation of commerce with foreign nations or among the States. This doctrine has often been announced by this Court, and is not questioned by counsel of any parties." We do not question it. This doctrine supports our position---so far as it is applicable to the case at bar. But it does not meet the whole of the case at bar, as that case is presented here on the pleadings and the evidence. It does not meet the main and principal fact in the case—that the government is about to take possession of these lands, reclaim them, make them fast lands, as a public improvement and for public purpose, and thus put an end to the servitudes to which the waters over them were subjected—and then the question arises—who has the title ? This suit was directed by Congress to be instituted to ascertain and determine that question—a title which, so far as these lands are concerned, was in abeyance up to that time, and which there was no possible way of asserting until the government took such action in the absence of some cataclysm of nature by which the waters of the Potomac should have emptied themselves once and forever into the Chesapeake, and its fountains should cease to flow, and its bed then become dry and fast land

Shively vs. Bowlby 152, U. S. R. 1, stands out as a great landmark in the judicial history of this country, and its high authority is also quoted by learned counsel for the government and by the court below against the claim of these appellants, respondents below. With due regard to the learned gentlemen who so ably represent the government, I must say I do not and cannot see wherein we are endangered by this decision, or the doctrines it announces. On page 11 this decision says: "By *the common law both title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing.* Therefore, the *jus privatum in such lands, as of waste and unoccupied lands*, belongs to the King, and the dominion there of the *jus publicum* is vested in him as the representative of the nation and for the public benefit." This quotation supports the distinction we contend for between the *jus privatum* of the King in these lands, and which is, and may be alienable, and the *jus publicum* in the waters which belong to him as representative of the public, and which is inalienable.

The learned judge then enters into a masterly and exhaustive discussion of the law of England at the time of the English settlements in America, and of the laws and of the decisions of the courts of the thirteen original states on this subject of ownership in, and title to, lands flowed over by tide waters. In this analysis he quotes from Lord Hale's treatise, "De Jure Maris," in which that great judge and lawyer speaks as follows of the right of the King in the sea and soil thereunder: "His right of fishing in the sea and creeks and arms thereof is originally lodged in the Crown *as the right of depasturing is originally lodged in the owners of the waste whereof he is lord*, or as the *right of fishing belongs to him; that is, the owner of a private or inland river.* But, though the King is the owner of this great waste, and as a consequent of *his propriety*, hath the primary

right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not be restrained of it, except in such places where either the King or some particular subject hath gained a proprietary in it exclusive of that common liberty. * * * *Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription and usage. Yet with these cautions, that the people have a jus publicum of passage for the jus privatum of the owner or proprietor is charged with that jus publicum which belongs to the King's subjects, as the soil of a highway is, which though, in point of propriety, it may be a private man's freehold, yet it is charged* with a public interest of the people, which may not be prejudiced or damnified." This is exactly what these appellants contend for. They admit, and have all along admitted, the *jus publicum* of fishing and navigation in the waters over these lands, and that this *jus publicum* will endure and continue so long as the waters of the Potomac flow to the sea, and are brought back by the tides. But when such a condition of things ceases as to the whole or any part of the river, by whatever means, natural or artificial, this *jus publicum*, for want of a subject matter in which it can be enjoyed or exercised, ceases, just as in a highway, where the fee-simple or reversion in the bed of the road may be in A subject to the right of the public to use the road for purposes of travel and traffic, yet when the highway is extinguished and is no longer used, or can be used, for such purposes, by any lawful artificial means or natural cause, the dormant title of A becomes alert and active and draws to it the *seisin* and possession of the disused bed of the road. And after a summary of the laws of the thirteen original States bearing on the matter in hand, the learned Judge, in Shively vs. Bowlby, declares "that the foregoing summary of the laws of the original States shows that there is no uniform and universal law on the subject (*i. e.*, the rights in and title to lands under tide waters), but that each State has dealt with the lands under tide waters within its

own borders, according to its own views and policy, reserving its own control over such lands, *or granting rights therein to individuals or corporations, whether owners of the adjoining uplands or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*"

It is further said by the court, in this case of Shively vs. Bowlby, referring to the doctrine in Maryland on the subject, and quoting with approbation the language of the Supreme Court in Smith vs. Maryland, 18, How., 71-74 :

" *Whatever soil below low water mark, is the subject of exclusive propriety and ownership*, belongs to the State on whose maritime border and within whose territory it lies, subject *to any lawful grants of that soil, by the State, or the sovereign power, which governed its territory before the Declaration of Independence.*"

The sovereign power which governed Maryland before the Declaration of Independence was the crown of Great Britain. And the King, in the exercise of the rights belonging to him, had, previously to the Revolution, granted first to Lord Baltimore as his private property the lands in controversy under and in the Potomac river.

This case, therefore, of Shively vs. Bowlby, which received the just encomium of the judge of the District Court, when critically examined and its real doctrine clearly brought out, does not sustain the positions of the learned counsel for the government or of the learned Court. Lands under the navigable tidewaters are not inalienable in the hands of the King ; they are part of his *jus privatum*, subject to the *jus publicum*, and may be granted to individuals or corporations, subject to the public rights of fishing and navigation. It was because this *jus publicum* in the waters of Lake Michigan, to the extent of the *grant from the Legislature*, was destroyed or impaired, that the act in Illinois R. R. vs. Illinois was declared to be beyond the power of the State.

The passages above quoted from the opinion of the Court in Shively vs. Bowlby are manifestly inconsistent with the doctrines of the brief of the learned counsel for the Government and of the learned Judge below. Their contention is that such submerged land under the waters of the Potomac were inalienable—that the title to them remained in the King, as a part of the *jus publicum*, of the *jura regalia* or royal prerogative, which are inalienable after and notwithstanding the charter of 1632. The caution given by Justice Gray in one of these passages—a grant applying the precedents in one State to cases arising in another State—is just and well worthy of attention.

In Gibson vs. United States, 166, U. S. 269, the case of Shively vs. Bowlby received an interpretation from this Court. In delivering the opinion in that case Chief Justice Fuller says: "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although *the title to the shore and submerged soil is in the various States and individual owners under them* it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the constitution." And further on the Court says: "In Shively vs. Bowlby the leading authorities of the courts of the United States, and of most of the States and of Great Britain, as to the character of the title to submerged lands, are considered, *and the conclusion announced that the title is in each State with full power in each State Legislature to confer it on individuals, subject at all times to the servitude of the Federal Government for the regulation and improvement of navigation.*" Just as they, or their waters rather, are subject to the common law servitudes of fishing and navigation.

It only required a comparison of the doctrines thus announced, with the pretensions put forward by the United States and the claims of these respondents as herein set forth, to see on which side in this controversy the authority of the cases of Illinois R. R. vs. Illinois and Shively vs. Bowlby falls.

XIV.

The Case of Martin vs. Waddell, 16 Peters, 367, Considered and Commented as an Authority in this Case.

The case of Martin vs. Waddell, 16 Peters, 367, has been pressed into this case so frequently and persistently during the argument as to render some observations on it proper and necessary with the view of determining how far and to what extent it is an authority, indeed if it be an authority at all in the case at bar.

1. In the first place it can be affirmed with great deference, but upon the indubitable authority of great writers and the current of judicial decisions, that the case announces doctrines on the subject of the right in and title to lands and soils under navigable rivers and waters, which are certainly novel before the decision of the Supreme Court of New Jersey in Arnold vs. Mundy, 1 Halstead, 1, on the sole authority of which case Martin vs. Waddell leans for support. For it will be seen on examination and comparison of the decisions, that the learned Chief Justice Taney in pronouncing the decision of the Supreme Conrt in Martin vs. Waddell, not only gives the sanction of his approval to the opinion in that case, but adopts wholly the reasoning and almost the very language of Chief Justice Kirkpatrick of the New Jersey Court.

The doctrine announced for the first time we submit in the case of Arnold vs. Mundy, and followed by the Supreme Court in Martin vs. Waddell, because it was a rule of property in New Jersey, is that the title to the lands and soils under navigable waters is in the King of England as part of the *jura regalia*, and is held by him in trust for the public, that the public may enjoy the rights of fishing and navigation, and is inalienable therefore, or if alienable goes to the grantee of the crown clothed with the same trust; that the Duke of York in his charter from Charles II took the same lands in question, under the Raritan river, subject to the trust, and transmitted them in his conveyance to the twenty-four proprietors of New

Jersey, bound by the same trust which restricted them from granting such lands out to individuals; that the twenty-four proprietors surrendered their right and title to these lands and soils on their surrender of the governmental authority and political jurisdiction of the province of New Jersey to the Queen of Great Britain in 1702; that the State of New Jersey succeeded to all the *jura regalia*, among them the title and right to and in these lands on the overthrow of the authority of the crown at the era of the Revolution.

Now if the first of these propositions be correct, and this whole chain of propositions depends upon the first one, that is, that the lands and soils under navigable waters are part of the *jura regalia* in the sense in which these words are employed in this opinion, and which of necessity must be the sense of the court, meaning the high prerogative rights of the crown, then it follows as a necessary legal consequence that these lands are inalienable by the crown, and the grantee, the Duke of York, took no title to them at all by his charter, and he conveyed none to the twenty-four proprietors by his assignment to them, and consequently there was no reconveyance of them to the crown in the deed of surrender to the Queen Anne in 1702. And further, it follows that the State on succeeding to the rights of the crown at the Revolution, took these lands and soil subject to the same trust for the public, and was as incapable of aliening them as the King or his successors. And yet by an obvious *non sequitur* it was held in both Arnold vs. Mundy and Martin vs. Waddell, that the grantee of the State did take valid title to these lands. The contest was about an oyster fishery, and the Court decided that the title granted by the State was superior to that granted by the twenty-four proprietors; logically, on the doctrine announced by the Court, neither the proprietors nor the State could make the grant.

To this it may be, and indeed it has been objected, that the State succeeded to all the rights of Parliament as well as the crown, and that Parliament by act might grant a valid title to lands under navigable waters To this position it is answered—

1. That there is not to be found on record a Parliamentary grant of any such lands.

2. That our forefathers always sedulously resisted the claim of the Parliament of Great Britain to exercise any legislative control over them; for that principle they went into Revolution. The rights of the crown they recognized. The claim of Parliament to legislate over them they repudiated and denied. They brought with them the common law as it existed at the settlement of the respective colonies, and they subsequently adopted, either by act of colonial assemblies or by judicial determinations, such statutes of Great Britain as they deemed applicable to their situation.

This adoption alone gave to these statutes any currency or force in the colonies. So that whatever right of control the States subsequently exercised or exercise over these lands or soils under navigable waters, such right was not acquired by succession to any rights of the Parliament of Great Britain over them, for the assumption of any such right or claim of right would have been always indignantly rejected. The plain and indubitable fact is that the right of the States (I mean the thirteen original States) over these lands and soils flowed over by navigable waters is derived, so far as it is derived at all, and did not originate and arise from the Revolution, from the King of Great Britain, solely, in whom such lands and soils were part of his *jus privatum*, and by whom they were ever held grantable, subject, so long as they were so overflowed to the *jura publica* of fishing, commerce and navigation. See authorities quoted under the preceding title.

The Charters to Lord Baltimoee and the Duke of York Compared.

While there is a general resemblance between the charters to Lord Baltimore and the Duke of York in some of their prominent features, a comparison will disclose many and very considerable and even radical differences between them.

Ch. J. Taney, in Martin vs. Waddell, in discussing the charter to the Duke of York, lays considerable stress on the fact that the word "soil" is associated in the letters patent with "the other royalties," and conveyed as such.

"No words are used for the purpose of separating them from the *jura regalia* and converting them into private property to be held and enjoyed by the duke apart from, and independent of, the political character with which he was clothed."

The charter of the Duke of York, which is set out at length in the special verdict found by the jury in Martin vs. Waddell, seems to have consisted of but one section, like that of James II to Lord Culpeper. There is a mingling and confusion of territorial rights and governmental rights in this charter, which, it may be conceded, gives some ground for the contention that in the case of this charter the grant of "the soil" under navigable waters was an incident of the quasi sovereignty conferred in the same section of that instrument. In this respect it differs widely from the Lord Baltimore patent. This patent contains twenty-two distinct sections. In the 3rd, 4th and 5th sections territorial rights are conferred; in the remaining sections the most extensive grants of political and governmental rights are set out and described. In the 5th section there is a feature peculiar to this charter, not contained in any other charter issued by the Crown to the American Colonies. The province therein is constituted a county palatine, and Lord Baltimore is clothed with "all the rights, jurisdiction, royalties, royal rights," etc., of a bishop of Durham. This is an entirely separate and distinct clause of the fifth section. The rights of quasi sovereignty, the grantee in this instrument possessed, are conferred in the subsequent sections, and are set forth with great particularity and minuteness. So that the severance of the territorial rights from "the royalties" and the jurisdictional and governmental rights which the learned Chief Justice of the Supreme Court failed to find in the Duke of York's letters patent for New Jersey, unquestionably is found to exist in the Baltimore charter. In this connection it is well

to note the special reservation contained in the proviso to the XVI section of the Maryland charter, before adverted to, by which the right to fish in the waters of the province, and to cure fish on the shore and banks of such waters, was, under certain expressed conditions, saved to the subjects of the English monarch.

The case of Martin vs. Waddell was decided on the authority of adjudicated cases in the New Jersey courts, which decided the law and practice of that State affecting titles to land and laying down a rule of property, were followed by the Supreme Court in virtue of its uniform rule and practice in such questions.

Can the case of Martin vs. Waddell be therefore invoked as an authority at all in the case at bar?

In answer to this inquiry it is submitted that it cannot be regarded as an authority applicable to this case.

1. A critical examination of Martin vs. Waddell cannot fail to disclose the fact that the learned Chief Justice who delivered the opinion, notwithstanding a partial and very moderate disclaimer to the contrary, relied on the case of Arnold vs. Mundy, and the authorities cited therein as to the law and custom of New Jersey upon the subject of the rights in and titles to submerged lands—in other words, Arnold vs. Mundy being a case in which the law and custom of New Jersey on the subject matter was to control, the Court followed the exposition of the law and custom of that State, delivered by its supreme tribunal, and this course was, and is, in accordance with the fundamental rule of the Supreme Court in like cases, namely, that in construing a statute or a law of a State, especially where a rule of property is concerned, the Supreme Court will follow the decisions of the State courts, unless such construction should be antagonistic to the Constitution of the United States.

See McKeen vs. DeLancey's Lessee, 5 Cranch, 22.
Bodley vs. Taylor, Ibid. 221.

In this case the Court says that "the practice of resorting to a Court of Chancery in order to set up an equitable title against a legal title received in its origin the sanction of the Court of Appeals while Kentucky remained a part of Virginia, and has been so confirmed by an *uninterrupted series of decisions as to be incorporated into their system*, and is to be taken into view in consideration of every title to lands in that country. *Such a principle cannot now be shaken.*"

Taylor vs. Brown, 5 Cranch, 255.
Massie vs. Watts, 6 Cranch, 165.

In 9 Cranch, 98, the Supreme Court says that "in cases depending on the statute of a State, and more especially in those *respecting titles to lands*, the Federal Courts adopt the construction *of the State Courts when that construction is settled and can be ascertained.*"

In 5th Wheaton, 279, it is stated that "the Supreme Court uniformly acts under a desire to conform its decisions to those of the State courts in their local laws."

"The Supreme Court holds in the highest respect decisions of State courts upon local laws forming rules of property."

2 Wheaton, 316.

In construing local statutes *respecting real property the courts of the Union are governed by the decisions of the State tribunals.*

Thatcher, *et al.* vs. Powell, *et al.*, 6 Wheaton, 110.

In Jackson vs. Chew, 12 Wheaton, 168, the Court say: "That it has been urged at bar, that this Court applies this principle (*i. e.*, following decisions of State tribunals in matters of local law) only to state constructions of their own statutes. It is true that many of the cases in which this Court has deemed itself bound to conform to State decisions, have arisen on the construction of statutes. *But the same rule has been extended to other cases, and there can be no good reason assigned why it should*

not be, when it is applying to settled rules to property. This Court adopts the State decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the State, when applied to titles to lands. And such a course is indispensable in order to preserve uniformity: otherwise the peculiar constitution of judicial tribunals of the States and of the United States would be productive of the greatest mischief."

In Day vs. James, 8 Wheaton, 535, the question arose on the construction by the Supreme Court of Pennsylvania of a clause of a will made in that State, and the Supreme Court says: It was urged at bar that the case was not one where the decisions of State courts on questions of local law establish rules of property, which this court would follow, but the court said: "This court always listened with respect to the adjudications of different States when they apply," and it followed the Pennsylvania court in holding the word "heirs" in the will to be a word of limitation.

In Green vs. Neal, 6 Peters, 297, this question of following the adjudications of State tribunals, on questions of local law respecting titles to lands, was very fully examined, and the court, McLean, J., delivering the opinion, held that the Supreme Court would not only follow the State decisions in matters of local law (the case was one where adverse possession and the bar of limitations were interposed), but that tribunal actually overruled its own former decision, founded on a construction of the State statute of limitations by the courts of Tennessee, the courts of that State having since the decision by the Supreme Court reversed their former ruling, and this was done avowedly to make the decision of the Supreme Court to conform to the later State decisions.

Webster vs. Cooper, 14 How., 488.
Townsend vs. Todd, 91 U. S. R., 452.

In the recent case of De Vaughan vs. Hutchinson, 165 U. S., 576, Justice Shiras, in delivering the opinion of this court, quoted, and adopted as his own, the language of Chief Justice Alvey, of the District Court of Appeals, in De Vaughan vs. De Vaughan, 3 D. C. App., 50, and referring to the Chief Justice of that court as late Chief Justice of the Court of Appeals of Maryland, and also quoted from several decisions of the last-named court as authoritative and decisive on this court, in pursuance of this uniform rule and practice. The question was the proper construction of the rule in Shelly's case.

This court said:

"In the Courts of Maryland where the law of real property is supposed to be the same as that which prevailed in this District, except as it may have been changed by positive legislation, since the cession by that State, the same principle of construction has been fully recognized, and appears in numerous cases, etc. *Accordingly*," continues Justice Shiras, "*we are relieved from the consideration of the innumerable cases in which the Courts of England and in the several States of this Union have dealt with the origin and application of the rule in Shelley's case.*"

In other words, this Court has determined that the law of real property is the same in the District of Columbia as in the State of Maryland, save where it has been altered, if at all, by legislation; and that in all questions touching its acquisition, tenure, transmission or conveyance, it will follow that law as construed and laid down by its highest tribunal, the Court of Appeals of that State. If any thing could add to the strength of this position it would be the fact that by the Act of Congress of the 27th of February, 1801, it was enacted: "That the laws of the State of Maryland not inconsistent with this title, as the same existed on the 27th of February, 1801, except as since repealed, are modified by Congress or by authority thereof, or until so modified and repealed, are continued in force within the District." (See 2, U. S. Statutes chap. 15, sec. 1, Abert's Com-

pilation of District Laws, chap. 34, sec. 2.) In Morrill vs. First National Bank, 91, U. S. 357, it was held that the common law was a part of the law so adopted.

Van Ness vs. Wyatt, 13, Peters, 298.
Kendall vs. U. S., 12, Peters, 622.
U. S. vs. Watkins, 3, Cranch ct., ct. R, 441.
U. S. vs. Simms, 1 Cranch, 258.

It is conceded that there has been no legislative change of the law on this subject.

Before leaving Martin vs. Waddell, I desire to call attention to a passage from Chancellor Johnson's opinion in Chapman vs. Hawkins 4, Md., Ch. Dec. already quoted. That case was decided ten years after Martin vs. Waddell, and in the agreement before the Chancellor, was cited not only as a high, but even a binding authority. This is the Chancellor's answer: "A passage from the opinion of the Chief Justice of the United States in the case of Martin vs. Waddell, 16 Peters, 410, has been read, and it is supposed to be in conflict with the decision of the Court of Appeals in Brown vs. Kennedy. But upon carefully examining the language of the Chief Justice, it will be found that no such conflict exists. He was not discussing the power of the King since *magna charta* to grant to the subject a portion of the soil covered by the navigable waters of the kingdom, without interfering with, or affecting the public or common right of user, for purposes of navigation or fishing, *but his power to make such grant so as to confer upon the grantee the exclusive right of fishing*; and he concluded that from the opinions expressed to the judges of the court of King's Bench in the case of Blundell vs. Catterall, 5 B. & A. 287-309, and the Duke of Somerset vs. Fogwell, 5 B. & C., 883, that the point must be regarded as settled in England against the power *not to grant the soil covered by navigable waters, subject to the common right, but to make such grant in violation, or in restraint of such right.* It is very clear that the opinion of the Chief Justice is *not* in opposition to the decision of the Court of Appeals in

Brown vs. Kennedy; *and that his high authority cannot be invoked to shake or throw a doubt upon the correctness of that decision.* But, if it were otherwise, considering as I do that the point in question *was expressly adjudicated by the Court of Appeals*, I should regard it as a binding authority; though setting as a Judge of the Land Office my judgment is not by direct appeal subject to the decision of the Court of Appeals." But, though looking to the case of Brown vs. Kennedy, *I am clearly of the opinion the State has the power to grant land covered by navigable waters subject to the right of the public to fish in and navigate them*, it by no means follows that she is bound to do so, or that she will do so in every case in which application is made. Judge Johnson was as Chancellor the Registrar of the Land Office. The offices had been united. In the latter capacity it was his right to determine in every case to grant or refuse a patent. In this case, on account of its peculiar circumstances, which he goes on to explain, and the strong equities made out by Chapman, the caveator to these same lands under an older patent, and *not on account of any want or defect of right or power in the State to make such grant of lands covered by navigable waters*, he refused to direct the issuance of a patent to Hoskins of such subtidal lands.

One of the leading questions in this case is a question of real property: the character of the title to the bed or soil under the tidewaters of the Potomac river. In the discussion of that question it will be maintained that in respect of this question the law of the District of Columbia is that of Maryland; that that law and the decisions of the Court of Appeals construing that law, must control that question, except in so far as that law has been changed by Legislature, and those decisions therefore rendered inapplicable and of no controlling authority.

I have shown in this brief that that Maryland law remained until changed by the act of its Legislature, Act of 1862, chapter —, and how the Courts of that State have constantly and uniformly construed and applied that law in every case involving

the question of title to submerged lands, and by an unbroken series of decisions. These decisions establish beyond controversy that under that law—

1. The lands and beds of navigable waters and rivers, where the tide ebbs and flows, is by the common law part of the *jus privatum* of the King, subject to the common right of the people, to fish in and navigate, and even, as Chief Justice Taney, in Martin vs. Waddell, suggests, "to bathe in" the overlying or overflowing waters.

2. That the King can make grant of such submerged lands or beds, and that his grantee will hold them or transmit or convey them, subject to the same public easements or servitudes.

3. That these servitudes being in, of and concerning the waters only, will endure or continue so long as these waters continue to ebb and flow over these lands or beds. But that—

4. As a necessary logical and legal corrollary to these propositions: that when these overlying and overflowing waters, either by artificial means (as in Browne vs. Kennedy, 5 Har., and Johnson, 196), or by any natural cause or conversion, cease to ebb and flow, as did the waters of the Red Sea under the rod of Moses (but more permanently), and these beds become dry land, then the owner of the title, however long that title has been in abeyance, become entitled to the seizure and possession, and that the government can take these lands from such owner only in the exercise of its right of eminent domain as it takes other lands—for public purposes and upon just compensation.

I have but one more observation, in conclusion, on the case of Martin vs. Waddell, which is so much relied by our learned friends for the government. It is this: That in deciding Martin vs. Waddell, as the Supreme Court did, it was pursuing this rule which it had framed for itself and continued consistently and inflexibly to pursue, and that it adopted the decision of Arnold vs. Mundy, being a construction of a local law respecting a rule of property in the State of New Jersey, the

following language of Chief Justice Taney at the close of the decision (page 418) makes plain. He says, speaking of Arnold vs. Mundy: "It is unquestionably entitled to great weight. It conforms with the construction uniformly placed on those charters and instruments by the other public authorities, and in which the proprietors had so long acquiesced. Public acts and laws, both of the Colonial and State governments, have been founded upon that interpretation, and extensive and valuable improvements made under it. In the case referred to the sanction of the judicial authority is given to it. And if the words of the letters patent had been far more doubtful than they are, this decision, made upon such a question, with great deliberation and research, ought in our judgment to be regarded as conclusive."

It is true that the learned Chief Justice disclaims in another part of the opinion putting the decision of the Court on that ground exclusively, but the disclaimer is a very moderate one.

If we are right in this conclusion that Martin vs. Waddell was decided in accordance with this well established rule of the Supreme Court, in deference to the decision of Arnold vs. Mundy, being the decision of the Supreme Court of New Jersey construing its own charter and its own law, as a rule of property, it follows, upon the authority of the above quoted adjudicated cases in the Supreme Court, that that tribunal would in a like Maryland case, coming before it, be construed to hold exactly the reverse of its holdlng in Martin vs. Waddell. For if any doctrine can be said to be held and established as a rule of property in Maryland by an unbroken line of decisions, beginning with Brown vs. Kennedy, 5 H. & J., 196, down to the most recent utterances of the Court of Appeals of that State on this subject, including Chapman vs. Hoskins, 2 Md. Ch., Dec., 483, it is the doctrine that the beds and soils of navigable waters and rivers are grantable, and that the grantee takes a valid and indefeasible title thereto subject to the operation and effect of the *jura publica*, or public easements of fishing, commerce and navigation, so long as they are covered with navigable

waters, and that when they cease to be so covered and become by any means dry land, and these public rights and easements are thereby terminated, the owner or grantee has as good and strong a title to them as the owner or grantee of lands on the peaks of the Alleghanies. To this rule all the authorities of the State conformed until the passage of the Act of 1862, Chap. 129, Code of Public General Laws of Maryland, Sec. 39, which forbade grants of such lands in future, which act of itself is an incontestable proof of the existence of such rule theretofore.

Before leaving this branch of the case it is necessary to call attention to the XXII section of the charter to Lord Baltimore, as that section has an important bearing on the question of title herein discussed and on the construction to be given to that charter. The general and familiar rule of law in regard to royal grants, contrary to the rule in ordinary cases of grants, is that they must be strictly construed as against the grantee—that nothing passes but what is clearly expressed and contained therein. The reason of the rule is given by commentators. Blackstone says (Book II, page 347): "A grant made by the King at the suit of the grantee shall be taken most beneficially for the King and against the grantee * * * Wherefore it is usual to insert in the King's grant that they are made, not at the suit of the grantee, but '*ex speciali gratiâ, certa scientiâ et mero motu regis.*' And then they have a more liberal construction. These terms are employed in the III section of the Baltimore charter. But, not content with whatever advantage of construction the insertion of these words in the charter might give the grantee, the King, in his bounty to his servant, had inserted the XXII section, the ~~title~~ like of which does not appear in any other charter ever issued by an English monarch, and by which, in the most careful and express terms, it was provided and directed that "if, peradventure, hereafter it may happen that any doubts or questions should arise concerning the true sense or meaning *of any word, clause or sentence* contained in this our present charter, *we will charge and command that interpretation to be applied always and in all things and in all courts and judicatories whatsoever to obtain, which shall be judged to be more bene-*

fivial, profitable and favorable to the aforesaid now Baron of Baltimore, his heirs and assigns, God's holy religion and the allegiance due to us, our heirs and successors, not to suffer any change, prejudice or diminution, although," continues the section, "express mention be not made in these presents * * * or any statute, act, ordinance, provision, proclamation or restraint heretofore made, etc., to the contrary thereof in anywise notwithstanding." So that were there any "doubts or questions" as to what was granted to Lord Baltimore in the III, IV and V sections of his charters (though I do not see there can be any), these doubts and questions would have to be solved in favor of the grantee, the Lord Proprietary. This charter is still a part of the fundamental law of Maryland. It is the foundation and the monument of the original of every title in the State. All proprietors must go up to it as the fountain and source of their rights. It is a rule of property. The third section of the first Bill of Rights adopted by the people of the State, that of 1776, contained this declaration: "The inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by his majesty Charles I. to Cecilius Calvert, Baron of Baltimore." (*See Constitution of Md., Abert's Compilation, page 644.*) Every subsequent Bill of Rights adopted by the people of the State, down to the last and existing one—that of 1867—contains the same declaration. That charter, except in so far as it has been rendered inapplicable to the *political condition* of the State by the Revolution and its inevitable results, is still incorporated with the political, civil and social status of our people. We claim under it, and we are bound by it, with this exception only.

We have now shown a clear chain of title, by descent, devise and conveyance, to these lands and beds under the tidewaters of the Potomac river, from Cecilius Calvert, first Lord Proprietary of Maryland, down to these appellants, respondents below, the heirs of James Markham Marshall. We have shown the right of *seisin* and possession thereto in the said heirs, following title by operation of law, now that these soils and beds have been in part reclaimed, and it is contemplated to reclaim an

additional area for a public purpose and make them dry land. The extent and character of the actual and proposed reclamation of these flats is stated by Judge Hagner in his opinion (Record, vol. VII, page 2473.) An area estimated to contain seven hundred and fifty acres, has already been converted into firm land, enclosed by walls and planted with trees. As much more remains to be converted into dry land by the Government for public purposes, to which, as it is recovered from the waters, as to that which is already reclaimed. We claim that our title *eo instanti* attaches this title, could not be asserted before. Title to lands or beds under navigable tidewaters, is regarded by all the authorities as a peculiar title, a title *sub modo*. It is called by some writers an inchoate title, convertibe into what is denominated a perfect title when the occasion arises, and that occasion does arise when these lands become or are made firm and dry lands. Until then, it is a title unaccompanied by any possessing right. There could be neither *actor or reus*, plaintiff or defendant in respect of such lands. The only party that by any possible construction could be regarded as suable in respect of these submerged lands is the United States. But the United States cannot be sued in their own courts without their consent, and never *en torts* committed by their officers.

Hill vs. U. S. 141, U. S. 598.
Gibbons vs. U. S., 8 Wall., 269.
Langford vs. U. S. 101, U. S. 341.

Now for the first time have we had our day in court, by the summons of the United States itself. It cannot plead laches, limitation or adverse possession against us.

In Chapman vs. Hoskins, 2 Md. Chan., dec. 487, already quoted, Chancellor Johnson discusses this question of title to submerged lands. The counsel for Hoskins, who had obtained a certificate on warrant and survey, urged the granting of the patent according to the general rule of the Land Office of Maryland, to let the patent issue in doubtful cases, and thus leave the parties to their remedies either at law or in equity.

The Chancellor who had sustained Hoskins against Chapman in his contention that lands covered by tidewater in the Potomac river were grantable (as above quoted), nevertheless refused to issue a patent in this case, and gave these reasons:

"I do not see how it is possible to try the efficacy or validity of the patent, if one issues, either in an action of ejectment or in any other form of action in a court of law, or by *seire facias* or information in a court of equity. It is clear, I think, that Mr. Chapman could not bring an action *for the land included in this survey so long as it is covered by water, because whilst so covered he has no possessory right thereto;* nor could *the sheriff put him in possession. Neither could Hoskins institute such proceeding* against Chapman, because the latter is not in possession, nor in its present situation does he claim any exclusive title to it, his (Chapman's) position being that so long as it is covered by the navigable waters of the river it was not grantable (a position which, as we have seen, the chancellor overruled and decided to the contrary of), or if grantable, it must be subject to the *jus publicum*, which the State has no power to impair, and that if hereafter the waters should recede from the shore, his rights as riparian proprietor attach to it. *But until then, and so long as the waters flow over the land, which may be for an indefinite period, no mode exists by which the question can be brought before a court of law, and it is not perceived upon* what ground the patent (if issued) can be called in question in a court of equity, because there can be no pretense that there was fraud, surprise or undue advantage taken in procuring it." It was no doubt a knowledge of the fact that there was no form of action or proceeding known to the law or in equity in or by which the title to these lands could be impleaded and determined, that led the Government to the passage of this special act, for the institution of this proceeding, "in the nature of a bill in equity," a proceeding certainly of a unique character, to try the question of title, and summoning into court all parties having any "right, title, claim or interest" in these lands. The heirs of James Marshall are among these

parties and they have made their claim and exhibited their right and title. What does the United States submit or urge against their right or title?

XV.

THE CLAIM OF THE UNITED STATES TO TITLE TO THE POTOMAC FLATS — THE ORIGIN, HISTORY AND LEGAL CHARACTER OF THIS CLAIM CONSIDERED AND DISCUSSED.

The answer of the Government is:

1. The United States claim title under and by virtue of the several grants or cessions of territory and jurisdiction by the State of Maryland, especially by the act of the General Assembly of that State of 1791, chapter 45, entitled "An Act concerning the territory of Columbia and the City of Washington." (See Abert's compilation of the laws of the District, page 654.)

Our reply to this ground of claim is, that as we have shown, or endeavor to show, that the whole bed or soil under the waters of the Potomac River, from bank to bank, and from its source to its mouth, were embraced within the limits of the charter of Charles I. to Cecilius Calvert I., Lord Proprietary; that they were granted to him in his character of Lord of the Fee, and that he held the title to them as his property, not as incident to his seigniory or to the grant of political jurisdiction, but as private right, subject to the public rights of fishing and navigation, so long as they were overflowed by the tides, and that they continued to be so held by him, "his heirs and assigns," down to the date of the aforesaid cession. We fail to see upon what ground, in law or equity, Maryland, by her deed of cession of the district or territory of Columbia, could, without the consent of those "heirs or assigns," convey these lands to the United States, or that the United States could accept and claim them.

1. Because upon a well-settled and universally-recognized principle of the law of nations, a cession of territory by one State to another, whether effected by peaceful agreement and

purchase, or by force, nothing passes but the public rights and public property; private rights and private property remain as they were before the cession, in the possesion of the owners. This rule applies even when the cession of territory is the result of successful war, as in the case of the cession of Alsace-Lorraine by France to Germany; private rights were held sacred even by the Iron Chancellor and his triumphant hosts *a fortiori* in case of a cession which is the result of a mutual and peaceful arrangement.

Woolsey Int. Law, Sect. 161.
Wheaton Int. Law, Eng.; Ed. Boyd's Note, Sect. 346.

But it is not necessary to quote authorities on a point so well recognized, for we have to point to the Act of 1791, Chap. 45, making this secession for our reply to this first ground of claim. In the second section of that is found the following proviso, inserted, no doubt, out of abundant caution by the very able, prudent and public-spirited statesmen ~~that~~ who *at that time* controlled the political affairs of Maryland.

After "ceding and relinquishing to the Congress and Government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," * * * it provides: "*That nothing herein contained* shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." There has been no such transfer of these submerged lands by the last Lord Proprietary of Maryland, Henry Harford, or by "his heirs or assigns." The sixth section of the same act of cession provided that foreigners should take and hold lands in said District in the same manner as such foreigners could take and hold lands in Maryland.

To this the United States, by its learned counsel, say in substance that: Granting, for the sake of argument, that the Lord Proprietary of Maryland, "his heirs and assigns, had title to

these submerged lands and soils under the waters of the Potomac river, under the charter of Charles I, as to his private property, subject only to the public servitudes in the waters over them, as contended for by the counsel of these appellants, we, on part of the United States, claim and assert in reply and by way of avoidance, that such title, if any, was extinguished by the Revolution and consequent change of Government in that State, that these lands thus became the property of Maryland and were ceded by her by the Act of cession of 1791, chapter 45, to the United States."

To the same effect also speaks the learned Justice who delivered the opinion of the Court below. (See Record, Vol. VIII, p. 2485.) He says: "The State of Maryland was under no obligation to rely upon confiscation acts to support its claim to sovereignty and government over the rights and territory formerly granted to the Proprietors." He then quotes from Martin vs. Waddell, 16th Peters, 410, and after continues as follows: "The change in the government was a *political act, flagrante bello.* It was as useless to resort to regular proceedings under confiscation laws *to divest Lord Baltimore of all claim of sovereignty and of property in his quality as Lord Proprietary, as it was to read the Riot Act before beginning the battle of Bunker Hill.* The conflict was raging between the revolted colonies on one side and the King of Great Britain and his subjects, who maintained his side of the contest, on the other. And the most prominent and obnoxious of this class, in the opinion of the people of Maryland at the date of the declaration, was Henry Harford, the absentee Proprietor." This severe arraignment of the last Lord Proprietary would seem to be hardly necessary for the learned Judge's argument The revolution in Maryland, as in the other colonies, was waged against the King and Parliament of Great Britain, not against the Proprietary and his government. He and his government became involved in the consequences as a subject of the King resident in Great Britain. While the convention, the committees of public safety and public meetings in the State resounded with denunciations of the King and Parliament, there was no word or expression of hostility to,

or reproach against, the Proprietary as to his government, indulged in. The Proprietary Government had ever been dear to the people of the province. They hailed its restoration in 1658 and again in 1716. In this presentation of the last Lord Proprietary I feel bound to say the learned Judge is unsupported by a single historical authority with which I am acquainted. Robert Eden, the last of the Proprietary Governors, and a relative by marriage of the Proprietary, was popular and esteemed by the people of the Province. "He was permitted," says McMahon, page 434, "to remain in the Province secure and privileged even after the establishment of the Provisional Government, and by its express exception he and his household were exempt from its authority. Enjoying this immunity under the sanction of the convention, he continued to reside in Annapolis until the June, 1776. To the remonstrances of other colonies the convention turned a deaf ear." The convention prevented an attempt at his arrest by a party of armed men and severely reprimanded the leader. "On his leaving the Province, Governor Eden was conducted to the barge," which was to convey him to the vessel on which he had return passage, "by some members of the committee of public safety, who took an affectionate leave of him, with every mark of respect." (See McMahon, vol. 1, page 435, note.) To the same effect speak McSherry, 175–191; Brown, 270–277. Bancroft, vol. 1, pages 244–45, speaks of "the mild forbearance" of the first Lord Proprietary. * * "At a vast expense he planted a colony, which for several generations descended as a patrimony to his heirs." That expense Chalmers, in his annals, chapter 9, page 208, says "amounted during the first two years of the settlement to the very large sum of forty thousand pounds." These qualities of mildness and forbearance characterize his descendants and successors in the government.

They may be said, indeed, to have carried these amiable qualities too far, for they suffered themselves to be robbed of large parts of their territory by neighboring proprietaries. The only complaint ever made against Cecilius Calvert, which was

well grounded, was that made by Charles (afterwards Charles II) while in exile. Sir William Berkeley had driven the Puritans out of Virginia. To them Governor Leonard Calvert, under instructions from Lord Baltimore, had given sanctuary and large tracts of land on the Severn. How they evinced their gratitude in 1650, on the accession of Cromwell to supreme power in England, history shows. For giving this refuge and donation of land, complaint was made to Charles. In violation of the right of Lord Baltimore, and to rebuke him for this toleration, Charles, then at Breda, undertook to remove Leonard Calvert as governor, and to appoint Sir William Davenant in his place. The commission of Davenant alleged the reasons of the removal and the appointment to be "because the Lord Baltimore did visibly adhere to the rebels in England, and admitted all kinds of sectaries and schismatics and ill-affected persons into that plantation" (Bozman History, vol. II, page 206.) Whatever obligations Cecilius Calvert owed to James I and Charles I, his descendants owed nothing to their two successors, the second Charles and the second James, but ill offices. The revolution of 1689 alone, while it deprived for twenty-five years Lord Baltimore of all political and civil jurisdiction in the Province, saved to him his charter. James II had, at the solicitation, it is believed, of Sir William Penn, ordered his Attorney-General, Sir Robert Sawyer, (whom Macaulay has pilloried to eternal infamy) to institute *quo warranto* proceedings to vacate the charter. I make this historical digression from the matter in hand, because this severe language of the Court below might, if its correctness went unchallenged, be construed into a sort of justification of the harsh measures adopted four years after the beginning of the revolution, by the Legislature of Maryland against Sir Henry Harford, the last Proprietary, and his rights of property in the confiscation Acts of 1780, to which I shall have occasion to refer subsequently.

The first proposition is that the mere change of government effected by the Revolution, which the learned judge describes as *a political act flagrante bello*, worked of itself, and without the

necessity of recurrence to any confiscation proceedings, a forfeiture of the lands and estates of the Lord Proprietary, and consequently of the lands in question under the tide waters of the Potomac. The judge quotes Martin vs. Waddell, 16 Peters, 410, for this proposition. But this case does not support this broad claim and pretension. Having previously determined that lands under the navigable waters of the Raritan River were part of the public domain, which the King could not separate from his sovereignty, and therefore could not separately grant out, the court held that they passed with the change of sovereignty to the new government. And if, indeed, the first part of the proposition were correct—that these were so held by the King, were *as lands* impressed with his high prerogative and public character—the second proposition would follow as a matter of course. For nothing is clearer or more familiar than that, on a change of government, all that pertains to the sovereignty, *public, political* rights, *public* domain and property, public buildings, pass to the new government whether that change was affected by conquest or by agreement and consent. But private property remains unaffected. We have endeavored to show heretofore in this brief that such lands, however, are not part and parcel of sovereignty, but are part of the *jus privatum* of the King and can be granted subject to the public uses in their water of the rights of fishing and navigation, and that whatever may be the law of New Jersey on that point, that this is, and has always been, the law of Maryland, which controls or should control this case.

The principle of international law on this proposition as to what passes by conquest or by cession has, perhaps, never been better or more clearly laid down than it was by this court in the case of U. S vs. Percheman, 7 Peters, 82. That was a case arising out of a cession of territory by treaty and agreement; but the doctrines announced cover and apply as weil to a case of violent dispossession of territory.

"It may not be unworthy of remark," says the court, page 87, "that it is very unusual, *even in cases of conquest, for the*

conqueror to do more than to displace the sovereign and assume dominion ove the country. The modern usage of nations, which has become , would be violated; that sense of justice and of right, which acknowledged and felt by the whole civilized world, would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest" (or of revolution, which is the same as conquest) "who can doubt its application to the case of an amicable cession of tention."

"The property belonging to the government of the vanquished nation, says Wheaton on Int. Law (Boyd's Ed., Sect. 346) *passes to the victorious State, which also takes the place of the former soverign in respect to the eminent domain. In other respects private rights are unaffected by conquest.*"

Hall's Int. Law, Sec. 139, p. 369.
Halleck's Int. Law, Chap. 19, Sec. 12.

In Society for Propagating the Gospel vs. New Haven, 8 Wheat, 465, Justice Washington, in answering the contention of the counsel for New Haven that the Revolution had worked a forfeiture of the right of this British corporation to hold lands donated to it before the Revolution, says: "When the defendant's counsel contends that the incapacity of this corporation to hold lands in Vermont is a consequence of the Revolution, he is not understood to mean that the destruction of civil rights existing at the close of the Revolution was, generally speaking, a consequence of the dismemberment of the empire. If that could have ever been made a serious question, it has long since been settled in this and other courts of the United States. In the case of Dawson's Lessee vs. Godfrey, 4 Cranch, 323, it was laid down by the judge who delivered the opinion of the court *that the effect of the Revolution was not to deprive an individual of his civil rights*, and in the cases of Terret vs. Taylor, 9 Cranch, 43,

and Dartmouth College vs. Woodward, 4 Wheaton, the court applied the same principle to private corporations existing within the United States at the period of the Revolution." As to the private rights of *persons*, there never had been any question. The plaintiff in this case was a British corporation, chartered by William III. in 1702, for the purpose expressed in its name; by purchase and by gift it had, before the Revolution, become possessed of certain lands in a part of New Hampshire which had subsequently become a part of Vermont. In 1794 the Legislature of this State passed an act granting these lands to the respective townships in which they were located, and directing the selectment of such townships sue for them, with the result mentioned.

In the case of Dartmouth College, Chief Jnstice Marshall delivering the opinion of the Court, says, touching this doctrine, which was advanced in that case, as in this, that the Revolution by some mysterious and occult agency worked the forfeiture of private titles and the destruction of private rights of property of those who did not adhere to it, says, page 651: "*By the Revolution the duties as well as the powers of government devolved on the people of New Hampshire.* It is admitted that among the latter was comprehended *the transcendant power oj Parliament* as well as of the Executive Department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old Government. The power of the Government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the Legislature to be found in the constitution of the State." I call attention to this last sentence, as I shall have occasion to refer to it again in connection with the discussion of certain alleged acts of confiscation passed by the Legislature of Maryland in 1780, and which are also set up and relied upon by the United States in this case.

In a concurring opinion in this case, Story, J., referring to this *revolutionary doctrine* of the cancelling and destroying effect of the Revolution on private rights and private property, says (page 706): "I might now proceed to the discussion of the second question—*i. e.*, whether the acts of the New Hampshire Legislature violated the provision of the Constitution of the United States prohibiting the State from passing any law impairing the obligation of contracts, but it is necessary previously *to dispose of* a doctrine which has been very seriously urged at the bar, namely, that the charter of Dartmouth College was dissolved at the Revolution, and is, therefore, a nullity," just as it is urged at bar in this case, and was in the court below, that the title of Henry Harford to these lands, if any he had, passed at the Revolution to the State of Maryland. The Justice then proceeds to discuss a case decided by Lord Thurlow and reported in 3 Bro. Ch. Cases 171, and which had been cited in support of this doctrine, and adds: "If by this Lord Thurlow meant to declare that all charters acquired in America from the crown were destroyed by the Revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the Crown, which would be monstrous. It is a principle of the common law, which has been recognized, as well in this as in other Courts, that the division of an empire works no forfeiture of previously existing rights of property. And this maxim is equally consonant with the common sense of mankind and the maxims of eternal justice." And after citing a number of cases he "*disposes of*" this doctrine in this summary language: "This objection, therefore, may be safely dismissed without further comment."

In Terret vs. Taylor, 9 Cranch, 50, Story J., in answer to a proposition advanced by counsel in that case, identical in character with the one now under consideration, here observed: "The dissolution of the regal government" (referring to the effect of our revolution) "no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its property. The dissolution of the form of government did not involve in it the dissolution of civil rights,

or an abolition of the common law under which the inheritances of every man in the State were held. The State itself succeeded only to the rights of the crown, and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights. Calvin's case, 7 Co., 27; Kelly vs. Harrison, 2 John C., 29; Jackson vs. Lunn, 3 John C., 109.

XVI.

THE CONFISCATION ACTS OF THE MARYLAND LEGISLATURE OF 1780, CHAPTERS 45, 49 AND 51; 1781, CHAPTERS 23 AND 38; 1782, CHAPTERS 58 AND 60, (2 KILTY'S STATUTES, MD.), AND THEIR EFFECT ON THE PROPERTY RIGHTS OF HENRY HARFORD, THE LAST PROPRIETARY OF MARYLAND CONSIDERED, AND IN CONNECTION THEREWITH THE CASE OF SMITH VS. MARYLAND, 6 CRANCH, 286.

Under this head we reach the main ground of claim and contention, on part of the United States, and it will be said that by the acts of confiscation passed by the General Assembly of Maryland in 1781, chapters 45 and 49, all the property and estate of the then Lord Proprietary of Maryland within that State were confiscated and seized to the use of the State on account of his loyalty to the government of Great Britain during the war of Independence, and by these acts the property and premises in question, even conceding it were the private property of Mr. Henry Harford, became forfeited to the State, and as public property belonging to the State at the time of the cession passed by the act of 1791, chapter 25, into the possession of the United States. Let us see.

Section 2 of the Act of 1780, chapter 45, 1 Kilty's Statutes of Maryland, the principal act of confiscation, reads as follows:

"Be it enacted, etc., That all property within this State, debts only excepted, belonging to British subjects, shall be seized and is hereby confiscated to the use of the State."

By the third section "a British subject" within the meaning of the act is defined, and it is enacted "that every person born within the dominion or allegiance of the crown of Great Britain shall be and he is hereby declared and adjudged to be a British subject within the meaning of this act, unless he hath by some subsequent act divested himself of this relation by adhering to us or our cause."

Deeming something further necessary for the divesting of title under the act, Chap. 45, the General Assembly at the same session by the act, Chap. 49, Sec. 1, appointed William Paca, Uriah Forest and Clement Hollyday commissioners for the purpose of preserving all British property seized and confiscated under the act, and declaring them to be in full *scisin* and possession of all British property seized and confiscated by said act without any office found, entry or other act to be done

Chap. 51 of same session directed the sale of several of the Proprietary's manors on the Eastern and Western Shores, and the proceeds were dedicated to certain specified public purposes. Of the like tenor and effect were several statutes subsequently passed in 1781, 1782, 1783, in which the names of the recusants were mentioned and their estates and properties ordered to be sold. In all these acts the commissioners named were specifically directed to do certain things in and about these properties thus declared to have been seized and confiscated by the Act of 1780, Chap. 45, to preserve and secure them or to dispose of them at the best advantage. (See Kilty's Statutes of Md., Vol. 1).

It is then assumed and claimed that Maryland became immediately, by virtue of this confiscation act, seized and possessed of all the proprietary rights in and to the soil (including that of the bed of the Potomac River) that was owned and possessed by the last Lord Proprietor of Maryland, Mr. Henry Harford, a British subject.

And this assumption and claim is made that these rights have been taken away, without a hearing, without a trial, "without conviction of treason or felony," without judgment. They

together constitute a legislative attainder. And the enquiry arises: Had the Legislature of Maryland the constitutional competency to pass such acts either?

1. At common law?

2. Under the Constitution of that State, adopted 3rd November, 1776, and in existence and effect at the passage of these Confiscation Acts. Many other acts were subsequently passed by that body. It is manifest from their character and provisions that the author of the Acts of 1780 did not choose to rely on this simple sweeping legislative *judgment* to accomplish this purpose. It is as well to take them all into consideration, as they are in *peri materia.* They are October, 1780, Ch. 61, Sec. 8; May, 1781, Ch. 37, Sec. 4; November, 1781, Ch. 28, Secs. 4 and 8; November, 1781, Ch. 31, Sec. 7; *April, 1782, Ch. 19, Secs. 1, 2 and 3; April, 1782, Ch. 60, Secs. 1 to 11, the whole act; November, 1782, Ch. 24, Secs. 1 to 5, whole act.* November, 1784, Ch. 81, Secs. 1 and 2; November, 1785, Ch. 66, Sec. 8; November, 1787, Ch. 23, Secs. 1 and 2. Kilty's Statutes of Maryland, vol. I.

It is an ancient, a familiar and fundamental maxim that our ancestors brought with them, when they emigrated to this country, the common law of the mother country, especially all those great principles of right, justice and freedom secured by Magna Charta as the birth-right and inheritance of all Englishmen.

On this principle our forefathers planted themselves in all their controversies with the English King and the English Parliament from the earliest settlement. On this principle they went into the revolution, and came out of that great struggle, bearing it aloft as one of the most precious trophies of their success.

When a man pleads equity, he must do equity.

When a man pleads a law, he is bound by that law.

When a man pleads a grant, he is bound by all that is in that grant.

These are among the fundamental maxims of every system of jurisprudence; the most ancient as the most modern, the most primitive as the most enlightened.

It is impossible to conceive of a system of law or government in which these principles did not exist and were not recognized, however they might be departed from in practice, from time to time, amid civil broils and commotions.

But more than this. Besides the universal claim of the English colonies in America, this claim as Englishmen to the common land as their possession and inheritance forever, many of the colonies in declaring their independence and becoming States, had for the first time in the world's history formulated a written Bill of Rights and a constitution to be the fundamental and controlling law of the new political establishments they were founding, to which fundamental law all other laws were to conform. The history of the last hundred years in England, especially their recent contest with the English Parliament, had taught these founders of new States the lesson that the freest and most popular depositories of power may become tyrannical and corrupt if left wholly unchecked in its exercise. The Parliament of England, which, under the dynasties of the Tudors and the Stewarts, were the only strongholds and bulwarks of the people's rights and liberties, had gradually, under the house of Hanover, and through the system of parliamentary corruption which they had introduced, and its claim to the legal fiction of omnipotence, become but an instrument of the King's will, and an agency of oppression and injustice more crushing and pervading than the tyranny of a single monarch.

They, therefore, adopted in laying the foundations of these new institutions, the idea and principle of a written declaration and a constitution which, besides asserting these great rights of the people in terms, should lay down the lines in which the government itself should be conducted. For after all, there is no difference in principle between that elemental maxim of tyranny *quod principi placet legis habet vigorem* of the civil law, and the maxim of the English law, *quod parliamento placet* (or

for that matter, *populo*) *legis habet vigorem.* Both in their view were equally vicious. They had abolished the former altogether. But while they had met the "*vultum instantis tyranni*," and met it unquailingly, they also had some experience of the "*civium ardorem prava jubentium.*" And they resolved to put a restraint on the Legislature and thereby even on the people, whom they, friends and champions of the people's rights though they were, did not propose to put on the vacant throne of that prince or clothe with the attributes of the Almighty. They established a paramount, permanent rule to which the functionaries of the Government in all its departments should conform in their resolutions and conduct, and wrote it out large and clear and full so that the temporary depositories of power should be reminded of their duty and of the limits to that power, and the people kept in remembrace of their rights. They did another thing the tremendous value and significance of which they did not themselves fully appreciate and understand at the time. By the necessary and unavoidable result of the nature of these institutions, or by direct and conscious creation, they made the judicial department the tribunal to ascertain and finally determine the question of the conformity of all legislative enactments with this paramount and fundamental law, and clothed it with the power to pronounce invalid, and, therefore, to nullify, the enactments which should infringe it, a provision without a precedent and without which the institutions these fathers of republics established would not have survived the lives of their founders. The evolution and development of this great safeguard of right and justice were left to time and experience, and time and experience have shown that this, as it was the most unique, so it was the most valuable of the political discoveries or inventions of the fathers.

Among the States which established a constitution and bill of right was Maryland. She was among the first.

In November, 1776, the people of Maryland in convention assembled had, before these enactments, framed, adopted and promulgated a Bill of Rights and a Constitution of Government,

which was to be the organic law of the new-born State. In the Bill of Rights, which was declared an integral part of the Constitution, we find the following fundamental principles and rules of government laid down :

SECTION 3. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to that law, * * * and also are entitled to all property derived to them from or under the charter granted by His Majesty Charles I to Cecilius Calvert, Baron of Baltimore.

SECTION 6. That the legislative, executive and judicial powers of the government ought to be forever separate and distinct from each other.

SECTION 15. That no retrospective or *ex post facto* laws ought to be made.

SECTION 16. That no law to attaint particular persons of treason or felony ought to be made in any case or at any time hereafter.

SECTION 18. That the trial of facts, when they arise, is one of the greatest securities of the lives, liberties and estates of the people.

SECTION 19. That no freeman ought to be taken or imprisoned or disseized of his freehold liberties or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

SECTION 24. That there ought to be no forfeiture of any part of the estate of any person for any crime, except murder or treason against the State, and then only on conviction and attainder.

XII.

These were the just and noble principles on which Maryland started on her career as a free and independent State, and by which she avowed to the world her conduct should be regulated. But, alas! States, like the members of which

they are composed, are neither infallible nor impeccable. But a few short years had run their course when her legislation bristled with enactments in flagrant disregard of these wholesome and self-imposed restraints on the exercise of arbitrary power.

Is it necessary to discuss these derelictions and point out particularly the fatal repugnancies between the enactments just recited and these great truths set out so clearly on the forefront of the constitution? They are patent on the face of them. Their unconstitutionality cannot and would not now for a moment be questioned. They are legislative judgments; in violation of the sixth section of the Bill of Rights, they deprive a citizen of the right of trial by jury; in violation of the third and the eighteenth sections, they attaint particular persons of treason; in violation of the sixteenth section, they inflict punishments and deprive a man of his property *without the judgment of his peers or the law of the land;* they denounce forfeitures of estates for treason, without trial, without conviction, without judgment. Every safeguard and security for their lives, their liberties and their estates which the people of Maryland had just enacted in their constitution were stricken down by these acts of confiscation. That the framers of these laws had many and strong provocations furnished them by the conduct of Great Britain in carrying on the war—conduct frequently marked by circumstances of great cruelty—is very true; and these provocations are eloquently and powerfully set forth in the preamble to the Act of 1780, chap. 45. But it is to meet the apprehended consequences of just such provocations in times of civil strife that these safeguards are intended; and if they are not intended to prevail against enactments like these, there is no reason for their existence in the organic laws of States; they would become idle and unmeaning phrases.

Before entering on a brief discussion of these enactments and showing their entire incompatability with the then existing constitution of the State, it is proper to quote what the court below says of these provisions of the constitution of Maryland. On

page 2486, of vol. VII, of Record, is found the following language: "The provision referred to in the Bill of Rights of Maryland, sec. 24, that there ought to be no forfeiture of the estate of any persons for any crime, except murder, or treason against the State, and then only on conviction and attainder," could have no application to the antecedent divestiture of all the powers of the proprietary government and their simultaneous devolution upon the people of the State, who, being already in actual possession of all powers and rights, that had formerly belonged to Lord Baltimore, saw fit to insert these words for the protection of their own people in the future. The offenses of Henry Harford, did not constitute "treason against the State, for they were committed against the inhabitants of the Province, and before there existed such a government as the State of Maryland * * * * A change of government resulting from a war of revolution, cannot need proceedings under indictment in a criminal court." This is certainly extraordinary language, and the announcement of novel doctrines. What doss the learned judge mean by "offenses"? What are offenses? Heretofore, they have been supposed to be breaches of some legal duty or obligation, one owes to the community or the State. "Where there is no law," says the apostle, "there is no transgression." And this is as true in law and civil society, as it is in religion and the church. Now, we are not concerned in this case with the proprietary's governmental and political rights and jurisdiction. We are only concerned with his rights of property and ownership, between which two things or classes of rights the charter draws the clearest distinction, a distinction which has been recognized by every writer on the history of Maryland, and by the express decisions of all the courts of the State wherever and whenever an occasion called for the consideration of the question.

What were the offenses of Henry Harford, as the learned Judge calls them, that *co instanti* on the first breaking out of hostilities, and before any government under the new order of things was established, worked "this antecedent divestiture of all the

powers of the proprietary government and their simultaneous devolution upon the people of the State" as a just and proper punishment and forfeiture therefor, the Judge does not inform us. The history of those troublous times is equally silent in regard to such offenses. He was guilty of being very young, a ward in chancery, still I think, under the control of guardians; he was born out of wedlock, and was the devisee of the entire estate and property of his father, including the Province of Maryland, by whose people his rights and authority were promptly acknowledged; was a subject of the Kingdom in England and had never been in the Province. These were his misfortunes rather than his offenses. The historical fact is he had given no offense, had provoked no hostility, the war was not made on him and his government, but against the King of Great Britain, and he was involved in it only in his political character as a subject of that monarch. Had he been in the Province at the beginning of the Revolution and remained quiet and silent as Lord Fairfax did on his estates in Virginia, there is every probability that he would have been left as undisturbed as the Virginians left that nobleman in the peaceful possession and enjoyment of his property rights. For the great body of the landholders of Maryland, then the powerful and controlling interest in the State, held all the titles to their estates from Harford and his ancestors, and so declared in the forepart of the Constitution they adopted, and would have been little inclined to disturb the title of him from whose ancestor they acknowledged they derived their own.

Returning to the subject of these confiscation acts and their alleged efficacy to strip the Lord Proprietary of all his property and estate without office, I have to say that it is a legislative attainder, and as such against the common law.

What is an attainder?

Blackstone Book IV., pages 380-381, answers the question. "When sentence of death is pronounced, the immediate inseparable consequence from the common law is *attainder*. * * * He is then called attant, *attinctus*, stained or blackened. * * *

This is after judgment, for there is a great difference between a man convicted and attainted, though they are frequently, through inaccuracy, confounded together. After conviction only a man is liable to none of these disabilities, for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; his conviction may be questioned for error in the indictment. * * * Upon judgment, therefore, of death and not before, the attainder of a criminal commences. * * * The forfeiture relates to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits; and, therefore if a traitor dies before judgment is pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands, for he never was attainted of his lands." Knowing by bitter experience in these civil wars the comprehensive and far-reaching destruction to the person and estate of the subject wrought by attainder, these were the strong restraints and checks placed upon it—these were the salutary safeguards by which the liberty, the estate, the life, the honor of the subject were fenced around and guarded from the wrath of Kings six hundred years ago in England; indictment, trial by jury, conviction, judgment, not one of these safeguards to be dispensed with. All these must happen and concur and move in their dread order and procession to the final catastrophe, attainder, forfeiture of estate and death. They are of no consequence, say the Court below, delivering its opinion in this country at the close of the nineteenth century, and speaking of a revolution which secured the freedom of a continent and proclaimed it to the world. "Law," this honorable Court has said, "is a progressive science." And so it is, and must be to fulfill its high and beneficent mission to mankind. But is this progression? Rather otherwise. The only offense, if offense it can be called, was the continued residence during the Revolution of Henry Harford in the country of his birth. There is no charge, was no charge, no pretence or fiction of any charge, no allegation that he did or said anything against the rights and liberties

of the province. On the contrary, there was not at that time in all England a man more deeply interested in the welfare and the preservation of the rights of that province; who had more reason and cause to deprecate and oppose the course of the British ministry towards the colony, for he had everything to lose and nothing to gain, as the event showed, by that course. His residence in England was necessary and unavoidable, *lex neminem ad vana aut impossiblia coegit.* We have seen what Blackstone's definition of an attainder is. What say our courts?

"A bill of attainder," says Field, J., in delivering the opinion of the Supreme Court in Cummings vs. State of Missouri, 4 Wall, U. S. R. 323, "is a legislative act which inflicts punishment, without trial; if the punishment be less than death the act is termed a bill of pains and penalties. Within the meaning of the constitution, bills of attainder include bills of pains and penalties. . . . These bills may inflict punishment absolutely or conditionally. . . . They assume the guilt and adjudge the punishment conditionally; they may inflict punishment on classes of individuals, as well as on individuals. . . . In all these cases there would be a legislative enactment creating the deprivation without the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals. . . . At all of them is the inhibition of the constitution levelled."

Justice Field, it is true, is speaking of "the inhibition" contained in the 10th Sect. of Art. I of the Constitution of the United States. But the same inhibition is contained in the Constitution of Maryland (see 15 and 16 Sects., above quoted), adopted by the people of that State four years before the passage of these confiscation acts, by virtue of which, it is claimed by the government, these lands of the Proprietary became forfeited to the State, which subsequently ceded them to the United States, which now claims title under that cession.

But it is well known that it was from the existing constitutions of the several States, Maryland among the number, in

whose organic law these fulminations were loudest and most distinct, that the inhibitions against Bills of Attainder and *expost facto* laws contained in the 9th Sect. (against Congress) and the 10th Sect. (prohibiting States) of Art. I of the Constitution of the United States, were taken. (See Cooley, Const. Law, 262, 263,)

The framers of this government had observed how these prohibitions in their constitutions had been disregarded by the legislatures of some of the States when public passions were rife and victims were demanded, and they resolved that in the constitution they were framing they would cut up and forever destroy those instruments of popular vengeance.

Justice Miller, while pronouncing a dissenting opinion in *exparte* (Garland, 4 Wall., 388), agrees with Justice Field in his definition and characterization of these bills of attainder.

1. "They were," he says, "convictions and sentences pronounced by the legislative department of the government instead of the judicial.

2. "The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. "The investigation into the guilt of the accused, or if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry." How exactly and literally these definitions fit these confiscation acts I need not point out. ~~They are~~ patent on the very face of them.

See Fletcher vs. Peck, 6 Cranch, 138.
Story on the Constitution, Sect. 1344.
Cooley on Constitutional Limitations, Secs. 259–264.

"There is no liberty if the power of judging be not separated from the legislative and executive powers," says Montesquien in his Spirit of the Laws, quoted with approbation in Federalist, No. 78 (Alexander Hamilton). In these enactments of the Legislature of Maryland, the legislative and judicial powers are

confounded and exercised by the General Assembly in face of the declaration of the 6th Section of its constitution, "That the legislative, executive and judicial powers of the government ought to be forever separate and distinct from each other."

On the usurpation of judicial power by the legislative department involved in these enactments, see University of Maryland vs. Williams, 9 G. & J. 367–409, et seq.; Crane vs. Meginnis, 1 G. & J., 464; Dorsey vs. Dorsey, 37 Md., 76; Grove vs. Todd, 41 Md.; Miller vs. State, 8 Gill, 148; Hagar vs. Reclamation, 111 U. S. R., 79; 1 Story Const., chap. 7; Cooley Const. Lim., sec. 35.

These principles of the common law, says the court below, these provisions of the constitution, could have no application in the case of the proprietary of Maryland, because "the power of government," including his rights of property in the court's opinion: "had been antecedently diverted, and devolved upon the people of the State," who being already in actual possession of all powers, ~~as all powers~~ and rights that had formerly belonged to Lord Baltimore," etc. Now in the interim between the 4th of July, 1776, the date of the Declaration of Independence, and the 3rd of November, 1776, the date of the adoption of the constitution of the new State, outside of the provincial government there were only self-constituted bodies called committees of Public Safety, in the several counties and the City of Baltimore. Can it be said that the rights of property as well as of government of the proprietary devolved on the patriotic citizens constituting these committees? Would anyone like to take a title to any of the lands (of the proprietary) (dry or wet, under the water or out of the water) from any or all of these excellent gentlemen? I submit not.

This opinion of the Court below, which is certainly in opposition to the conclusions of this honorable Court in Fairfax Derrell vs. Hunter, 7 Cranch., 603; Danson's Lessee vs. Godfrey, 4 Cranch., 323; Tenet vs. Taylor, 9 Cranch., 43, a very strong case; Dartmouth College vs. Woodward, 4 Wheat., 654; Society, etc. vs. New Haven, 8 Wheat., 481, and the

more recent cases growing out of the late Civil War, above quoted, exhibit, I respectfully submit, an indisposition and reluctance on the part of that Court to rest this divestiture of the Proprietary's title to these lands solely on the Confiscation Acts of Maryland, passed four years after the adoption of a constitution which, in the sections above set forth, condemns, reprobates, anathematizes and forbids the very acts which the Legislature of 1780 undertook to do. But upon these Confiscation Acts that divestiture must rest, if at all.

If these acts were acts of a Legislature of one of our States at the present time, and the constitution of that State contained provisions similar to those contained in the constitution of Maryland, when, in 1780, these confiscations were passed, could there be a doubt as to the answer of any court on the question of their constitutionality?

Does the lapse of time impair the force of these principles or bar their application in a case which has just arisen to rights of property which, for the first time, could be asserted in a court of law?

XVII.

THE CASES OF SMITH VS. MARYLAND, 6 CRANCH, 286; OWINGS VS. NORWOOD'S LESSEE, 2 HAR. VS. JOHN, 104, AND HALL VS. GITTINGS, IBID 114, AND THEIR AUTHORITY CONSIDERED.

At this stage of the discussion the learned counsel for the Government, as does the court below, sustaining their contention in this regard, says:

1. Admitting the right and title of the Proprietary to the soil under the navigable waters of the Potomac River, as claimed for him under the charter, as part and parcel of his private estate, and

2. Admitting further that the Revolution by its force and effect did not divest him of that right and title; the government claims title thereto, by reason of the confiscation acts of the Maryland Legislature *non obstante*; the inhibitions in the constitution of that State; that by the mere stroke of the legisla-

tive pen, without compliance with those safeguards set out in this constitution, which are mere formalities, though part of the organic law, and which imposed no restraint on the omnipotent power of the General Assembly; and that this doctrine has been laid down in Owings vs. Norwood's Lessee, 1 Har. vs. Johnson, and Hall vs. Gittings, Ibid 114, and Smith vs. Maryland, 6 Cranch, 286, which are decisive on this point, it is said.

To this it is answered:

1. That it is to be noted that these two Maryland cases were decided in 1806, and Smith vs. Maryland was decided in 1810.

2. I have already adverted to the fact that among the blessings conferred up us by our Revolutionary fathers, after that of independence, the greatest was the framing and establishment of written constitutions containing a Bill of Rights as part thereof as the paramount law and idea of government, novel and original, if not without a precedent in the history of political institutions. These constitutions have received the applause of mankind, and nations, as they have become free, have universally followed our example in this regard.

3. That by declaring in these instruments that the legislative, executive and judicial functions should be kept separate and distinct as a principle vital to free institutions, and by making these constitutions the supreme law of the State, these fathers consciously or unconsciously provided a most important and valuable security for the rights of person and property, in thereby making necessarily the judicial department the tribunal of determining the question of the conformity of legislative enactments with this supreme law. It is not an exaggeration to say that if this security or safety valve had not existed that the governments these fathers founded, both State and national, would not have survived the vicissitudes of the century through which they have passed, not without scathe and difficulty.

But the idea was new. The people of that day were familiar with the idea or principle of the so-called omnipotence of the British Parliament, that could do anything, as the popular phrase

went, save make a man a woman, or a woman a man, and by a very natural association of ideas they communicated this attribute of omnipotence of the British Parliament to the new legislative bodies which had been created. It happened, therefore, that this new idea of legislative subordination to a paramount law, and of the right and duty of the judicial tribunals as one of their appropriate and necessary functions when there was presented to them a case involving a clear clashing or conflict between a legislative enactment and this paramount law, to declare which of the two conflicting laws must prevail, and as a matter of plain and obvious reason and necessity, to determine that the paramount law must prevail, and the failure of the legislative enactment. This idea was a plant of slow growth. It is, indeed, a delicate and transcendent function, and courts approach its exercise now in any given case, not indeed with fear and trembling, but with care and circumspection, with reluctance even, and only when a plain case of conflict is made out. The first attempts of the judge to exercise this novel function, of which we have any report, encountered such hostility and met with such results, that the just and proper reluctance of judicial authority to take up such question as the incompatibility of a legislative enactment with the supreme law was certainly not abated, if it was not increased. In Rhode Island in 1786, and in Ohio in 1803, the judges who made such essays were vehemently denounced and finally impeached, and though the impeachment proceedings were ultimately unsuccessful, the judges failed of their re-election. See Cooley, Const. Lim., 161, note Story Const., Sec. 1344.

Fletcher vs. Peck, 6 Cranch, 87, was one of the earliest cases in which this doctrine was maintained. But that was a case of conflict between two legislative grants of the same lands, and involved the consideration of the non-impairment contract clause of the Federal Constitution.

But, the opinion of Chief Justice Marshal in the great case of the Dartmouth College, 1819, perhaps did more than any one other case, or many other cases if they had occurred, to open

the minds of bench and bar and of the people to the reception and full recognition of the significance as well as the correctness of this doctrine. For besides what he actually decided in that case which came under the non-impairment contract clause of the Constitution of the U. S., that opinion contained one pregnant sentence or intervention. "A repeal of this charter at any time would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the Constitution of the State. This little seed took root, and has grown into a great tree, beneath whose protecting arms the threatened but innocent victims of arbitrary power or popular frenzy find safety and protection. That sentence or intimation was almost as valuable and productive as the decision itself in building up and strengthening the securities and safeguards of the rights of persons and of property against legislative invasion, especially in times of civil commotion and disorder.

Now it is a singular fact that neither in the two Maryland cases, nor, as far as the record discloses in Smith vs. Maryland, quoted to sustain these acts of legislative invasion of property rights of Henry Harford, did the counsel raise or argue, or did the court therefore, discuss or decide the point of the inconsistency of these Acts of 1785, Chapter 45, 49 and 51. We respectfully submit, therefore, considering all these facts, that these cases are not of the high and binding authority claimed for them by the learned counsel for the Government and by the learned Court below ; nor that we are concluded by them from respectfully submitting to this court, here, and now, the question of the other and plain incompatibility of these confiscating acts with the then existing Constitution of Maryland, in a case where that question could for the first time be presented.

XVIII.

Were these Lands Confiscable at all, Conceding the Efficacy of the Acts of 1780 (Chapters 45, 49 and 51) for that Purpose?

It is manifest, from an examination of all these acts and supplements to acts, a statement of which has been given, that the Legislature of the State was not content to rest their right to take away the property of Henry Harford on the Acts of 1780 unsupported and alone. They proceeded from time to time, and as exigency arose, to order the commissioners named in Chap. 49 to seize and sell the property and manors of the Proprietary and to dispose of the proceeds. This was, perhaps, regarded as a something of a substitute for the imperative inquest of office required, as I have shown, by the common law. Land to be forfeitable or confiscable must be lands in which there is some right of *seisin*, either present or in reversion, which, in the course of reasonably definite and determinate time, can be asserted on the part of the party proceeded against, his heirs and assigns. "By attainder," says Blackstone (Book IV, Chap. 29, p. 31), "in high treason a man forfeits to the King all his lands and tenements of inheritance, whether fee simple or fee soil, and all his rights of entry on lands and tenements which he had at the time of the offense committed or at any time afterwards, to be forever vested in the King."

The Statute 33, Henry VIII., Chap. 20, the most extensive and comprehensive scheme of spoliation and robbery under the name of confiscation ever passed by an obsequious and servile Parliament, made reversions and remanders and every species of estate a man could hold in lands or tenements, subject to forfeiture for treason. Still it remained necessary that some right of entry present or contingent in some determinate time should exist at the time of the offense. And it is to be observed that 33 H., Chap. 20, was never in force in Maryland. Several

other statutes of that monarch were (see Alexander's Statutes of England, in force in Maryland, pages 2, 3), but not this iniquitous act. (See also 1 Hale, P. C. 240).

Now the lands in question have been from time certainly ("whereof the memory of man runneth not to the contrary") covered and overflowed by tidal waters. The title to such lands is regarded by all writers on the subject as *sui generis*. The waters over them are charged with inalienable public servitudes; no right of entry or seizure exists as to them. On this point the non-confiscable character of the title to such overflowed lands, I call respectfully attention to a passage in Chancellor Johnson's opinion in Chapman vs. Hoskins, 2 Md., Ch. Dec. 496, 494. In this passage he says that were he to grant the patent applied for by Hoskins he knows no form of action, either at law or in equity, by which the applicant for the patent could try the validity of the patent; nor could Chapman, the caveator, because "so long as the land is covered by water he has no possessory right thereto; nor could the sheriff put him in possession. So long as the waters flow over the land, which may be for an indefinite period, no mode exists by which the question can be brought before a court of law." If this be so, and there can be no doubt of it, how can these lands, in legal controversy now for the first time since the flood, by the action, and at the instance of the United States Government, be said to made dry land be confiscable in 1780?

And here let me refer to what Mr. Kilty says in his invaluable treatise, "The Landholders' Assistant," in what was regarded by him and in his time as the "confiscated" and the *confiscable* property of Harford. On page 302 he says: "But, first, it is to be observed that although I have supposed the property to fall indiscriminately under the act of confiscation, yet the land remaining vacant, though generally considered as belonging to him, the proprietary, as much as his manor and other improved lands, was not in the measures taken by the legislature for the securing and disposing of confiscated property in any manner comprehended within that description. It will not,

therefore, in future be spoken of as property confiscated, but merely as land found at the Revolution vacant and unappropriated within the limits of the State." It is quite plain from this quotation that the mind of that old and learned lawyer, John Kilty, did not rest altogether satisfied as to the effectiveness of the confiscation acts of 1780 to accomplish what they were intended to accomplish—the divestiture of the title of Mr. Harford in any of his lands, dry or wet—and that he was very clear that they did affect, if at all only "his manors and improved lands," which by several of these later acts were specifically and by name ordered to be taken and sold, and did not affect the vacant and unappropriated lands. Now if these acts did not affect the vacant lands, of which there were quantities all over the State, on what ground can the acts be said to affect the submerged lands under the tidal waters of the States, and if so, then the title thereto remained in him, his heirs and assigns down to to-day. This opinion of Kilty, I shall refer to again, under the succeeding head, when I shall come to discuss the treaties between this country and Great Britain of 1783 and 1794.

We maintain, therefore, on these considerations and on these authorities, that the Confiscation Acts of the Legislature of Maryland, 1780, Chapter 45–49, and the subsequent Acts of that body supplementary thereto, are and were void and of no effect; that no forfeiture of these lands was thereby incurred; that the title remained in the last Proprietary, his heirs and assigns until the conveyance of the 9th of June, 1888, when the same was granted to these respondents.

It may here be suggested in this connection that from the provisions in some of its later enactments in the matter of confiscation, as the act of 1780, chapter 51; 1781, chapters 23 and 38; 1782, chapters 58 and 60 (2 Kilty's Statutes), the State of Maryland did not rely with entire confidence on the Acts of 1780, chapters 45 and 49, as alone sufficient in law to divest the title of owners of lands claimed to have been confiscated by those two legislative judgments. These later enactments, evidently to impart to these two acts or judgments, as they may

be more properly described, greater efficacy, if possible, for that purpose, provided for entry to be made and possession taken of the lands and estates of parties affected by those two acts. Now the lands and premises in question were never so proceeded against, were never entered or possessed, and title therefore to them was not divested, certainly the proceedings looking to such divesting were incomplete when the treaty of 1783 went into effect. It was held in Fairfax's Devisee vs. Hunter, 7 Cranch, 603, that in such cases the title of the owner, a British subject, was protected by the sixth Article of the treaty of 1783.

XIX.

The Treaties of 1783 and 1794 Between the United States and Great Britain and their Effect Considered.

Assuming the propositions under the last head to be established:

1. That the lands in question being under navigable waters, subject to the ebb and flow of the tide, were incapable of seizure and posession, and therefore not confiscable or subject to forfeiture. and,

2. That they were not actually confiscated and could not be, according to the opinion of Kilty, than which none was of higher or more respectable authority; then we say it follows as a necessary legal consequeuce, that the title of Mr. Harford, though a British subject, and an alien to these lands, remained in him and was secured and protected.

First, by the sixth article of the definitive treaty of peace between the United States and Great Britain, Sept. 3, 1783, and second, by the ninth article of the treaty between the same high contracting parties of 1794. See the two treaties, U. S. Statutes, Vol. 8, pp. 80 and 116, respectively.

By the sixth article of the treaty of 1783, it was agreed "that there should be no future confications made or commenced against any person or persons for by reason of the part he or they have taken during the war." In point of fact, there were

no confiscation acts passed by the Maryland Legislature after 1783, nor are any set up or alleged. It is on those of 1780, if at all, the Government must rest its claim.

By the ninth article of the treaty of 1794 it was agreed "that British subjects who now hold lands in the United States, and American citizens who now hold lands in the domains of His Majesty, should continue to hold them respectively, and may grant, sell or devise them as if they were natives, and should have all legal remedies respecting such lands, and as to them should not be regarded as aliens."

In Harden vs. Fisher, 1 Wheaton, 300, it was held that to entitle the party to claim the benefit of this ninth article of the treaty of 1794 he must show title in himself or his ancestor at the time the treaty was made. We have shown title from the date of the treaty to 1632, the date of the grant of the charter of Maryland.

In Orr vs. Hodgson, 4 Wheaton, 453, it was held that the sixth article of the treaty of 1783 protected from forfeiture, by reason of alienage, land then held by a British subject.

Though an alien (in some sense) and a British subject, Mr Harford did hold these lands at the time of the treaty of 1783, assuming our positions heretofore taken, especially under last head, to be well taken.

In Fairfax's Devisee vs. Hunter's Lessee, 7 ~~Peters, 85~~ Cranch 620, before quoted, it was held that "Dennis Martin Fairfax, though a British subject, held a fee-simple title under the devise to him by his uncle, Lord Fairfax, in his will of 1781, to his lands in the Northern Neck of Virginia, which continued undisturbed and was protected by the ninth article of the treaty. Under the authority of Hodgson vs. Orr, it was equally protected by the sixth article of the treaty of 1783.

On the theory of our preceding propositions being correct, Mr. Henry Harford stood exactly in the same position as Dennis Martin Fairfax in 1783, and in 1794 was entitled to the benefit of the same sixth article of the treaty of 1783 and of

the ninth article of the treaty of 1794. *Mutatis mutandis*, the language of Story, J., in Fairfax's case can be strictly applied to him.

By the sixth section of the deed of cession of the territory of the District of Columbia to the United States by the State of Maryland, it was enacted, "that any foreigner may, by deed or will hereafter to be made, take and hold lands within that part of the said territory which lies within this State in the same manner as if he was a citizen of this State, and the same lands may be conveyed by him and transmitted to and inherited by his heirs or relations as if he and they were citizens of this State." This removes all question as to the legality of the devises and conveyances of the Harfords from the time of the cession down to the present day in respect to these lands. Because it would be too narrow and too indefensible a construction, we submit, to place on this section that it was confined to wills and deeds of property hereafter to be made when Henry Harford held title from the settlement of the province which included this territory.

XX.

The Fourth and Fifth Articles of the Treaty of 1783, in Connection with the Maryland Act of 1787, Chapter 25, Considered with Reference to the Title to these Lands and the Sixth Article of the Constitution of the United States.

By the fourth article of the treaty of 1783, it was agreed that the creditors on either side should meet with no lawful impediment to the recovery of *bona fide* debts contracted before the war.

By the fifth article, which was the most important one on the part of Great Britain, "it was agreed that Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the restitution of all estates, rights and properties which have been confiscated belonging to real British subjects." There were other stipulations for earnest recommendations to the States, by Congress, for restorations of con-

fiscated property and estates to other classes of persons, but it is not necessary to refer to them. Mr. Henry Harford, the last Lord Proprietary, belonged to the class described in the above quotation from the sixth article as "real British subjects," whose estates had been confiscated; that is, persons who were born and had resided in Great Britain.

The British plenipotentiaries were most anxious and persistent, in deference to the instructions of Lord Shelburne and the express wishes of George III, to secure an absolute agreement from the American negotiators to restore all confiscated estates and properties to all classes of persons, to Americans, loyalists as well as "real British subjects." In this he failed, the American plenipotentiaries disclaiming, on the part of the Congress of the United States, all power or right to bind the States by such stipulation. The most they would concede was what was finally agreed to, *i. e.*, that Congress would earnestly recommend such restitutions to the several States, and with this stipulation the agent of Great Britain had to be content. The British creditor, it was agreed, should suffer no legal impediment in suing for and recovering the full value of his debts. These were the considerations moving to Great Britain. The American negotiators, Benjamin Franklin and John Adams, obthined as results of the treaty—

1. The acknowledgment of independence of the United States.

2. The free navigation of the Mississippi River.

3. The acquisition of a very large territory in the West and Northwest.

4. A liberal boundary line on the Northwest.

5. The right of fishing on the Banks of Newfoundland.

6. The speedy evacuation by the British troops of all the forts and garrisons held by them within the limits of the United States.

These were the high and valuable considerations moving to the United States.

One of the earliest cases that arose under this treaty was the case of Ware et al. vs. Hylton et al, 3 Dallas, 199. It was a care of a British creditor suing an American debtor on a bond executed before the war, under the fourth article of the treaty.

It was held, Chase, J., delivering the opinion of the Supreme Court:

1. That under the articles of Confederation it was competent for Congress, in the exercise of the treaty-making power, conferred exclusively upon it by the ninth article, to make the agreement contained in the fourth article.

2. That under the ninth article of the Articles of Confederation and the sixth article of the Constitution of the United States, a treaty is the paramount law of the land, to the extent that it repeals or annuls a law of a State which is repugnant to it.

In this case an American debtor availed himself of a law of Virginia, passed during the war of the revolution, by which he was authorized to pay over the amount of the debt into the State treasury, which gave him a receipt and discharge of the debt or so much of it as he paid in. After the war the British creditor sued and recovered the whole amount of the bond, although a great part of it had been paid, as stated, into the treasury of Virginia. The court held that the debt had been completely confiscated, but that the fourth article of the treaty annulled the act of confiscation and restored to the British creditor his full right to sue and recover, and the court pretty broadly intimated, in response to a suggestion of counsel, who referred to the fifth article above quoted as furnishing light in construing the fourth article of the treaty, that it would have been competent for the American negotiators, under the ninth article of the Articles of Confederation between the States, to bind the States to a complete restoration of the estates and property confiscated by them had these negotiators thought proper to do so, and it attributed their refusal to make such stipulations in answer to the earnest and repeated request of the

British minister, not to a want of power, but to a want of disposition, and to their superior diplomatic astuteness and fitness.

The limits of this brief, already expounded perhaps to exhorbitant dimensions, forbid making any copious extracts from this interesting opinion of the Court delivered by Chase, J., and concurred in by Paterson, J., and Cushing, J., and Wilson, J., in separate opinions. (Iredell, J., who delivered the adverse opinion in the court below, although not sitting in the case, filing by consent his adverse opinion.) It is a learned and exhaustive exposition of the law upon the subject in which the treaties 1783 and 1794, the articles of the old Confederation and the Constitution of the United States, are drawn upon and examined with great fullness and minuteness.

In this connection, see Sixth Article of the Constitution of the United States, which declares "that all debts contracted and all engagements entered into before the adoption of this Constitution shall be as valjd against the United States under this Constitution as under the Confederation." In Smith vs. U. S., 10 Peters, 331, the Supreme Court held "that grants, whether inchoate or perfect by Spanish authorities or French authorities previous to the acquisition of Louisiana, are established of such character that a court of equity could, according to its rules and the laws of Spain, consider the conscience of the King to be so affected by his own or the acts of the lawful authorities of the Province, that he had become a trustee for the claimant and held the land claimed by an equity upon it, amounting to a severance of so much from his domain before the 10th of March, 1804, in Missouri (the date of the Louisiana purchase by the United States) the United States, by treaty, having bound itself to carry out every grant, concession, warrant or order of survey which before the 4th of March, 1804, had created any legal or equitable right of property in the land so claimed, so that in every case the above question arose, the United States, by treaty, put themselves in place of Spain as much so as if the territory (Louisiana) had not been ceded." This is the equity of nations. Applying the principles thus

announced as the rule of conduct among the States to the facts of our case as they have been disclosed, there could be no doubt in any fair mind whither such application would lead us. In this case it was also held "that the United States, in consenting to be made defendants in equity at the suit of every claimant of land, waived all rights which the treaty could give them as purchasers, for valuable consideration, without notice." The application of this doctrine to this case is obvious.

In Hopkins vs. Bell, 3d Cranch, 454, the treaty of 1783 was held to operate as to repeal as to the parties affected by it, the Virginia statute of limitations.

On the subject of the construction of treaties in addition to the authorities already quoted, see—

Johnson vs. McIntosh.
U. S. vs. Schooner Peggy, 1 Cranch, 109.
Pollard Heirs vs. Kibbie, 14 Peters, 416.
U. S. vs. New Orleans, 10 Peters, 734.
Carver vs. Jackson, 4 Peters, 101.
Foster vs. Nelson, 2 Peters, 315.
Society vs. New Haven, 8 Wheaton, 465.
Fairfax's Devisee vs. Hunter's Lessee, 7 Peters, 87.
Lamb vs. Davenport, 18 Wall, 310.

It is a matter of history that Congress, in pursuance of the fifth article of the treaty of 1783, did recommend to the States the restoration of British property and estates. And it is also a significant and pregnant fact that the State of Maryland passed an act which indicated a purpose on her part to comply with the recommendation, which was as near to a stipulation as a recommendatory trust is to an actual trust, and the former is upheld often in equity as a trust. (See Perry on Trusts, 113, Sections 246, 247, note 4; Lewin on Trusts, 156, 2; Smith's Leading Cases, 550).

XX.

The V. Art. of the Treaty of 1783 Considered no Connection with Act of the General Assembly of Maryland, 1787, Chap. Sec. 1. Kilty's Statutes of Maryland.

By the fifth article of the treaty of 1783, it was agreed "that the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights and properties of persons resident in districts in the possession of his Majesty's arms and who have not borne arms against the United States," and after stipulating for other classes of persons, the article goes on with this language: "and that Congress shall also earnestly recommend to the several States a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which, on the return of the blessings of peace, should universally prevail." This fifth article is given in full in a letter from Mr. Jefferson, Secretary of State, to Mr. Hammond, the British Minister, dated May 20, 1782, and is found in Vol. VII of Record pages 2128 *et seq*. It is to be regretted that the letter of Mr. Hammond to Mr. Jefferson has not been supplied by the counsel for the Government.

Mr. Henry Harford, the last Proprietary of Maryland, is embraced in the first description or class of persons mentioned in whose favor this fifth article was agreed and entered into by the American plenipotentiaries. He was not an American loyalist or refugee or tory. He was a person resident in a district in the possession of His Majesty's arms, and had not borne arms against the United States. And certainly it was a meritorious class of persons. The revolution effected the dismemberment of an empire of which, up to the difficulties that led to it, the colonists were proud to belong. They claimed to possess the rights of Englishmen. England was called the mother country until, by her pride and injustice, she deservedly forfeited that title. This class of persons certainly were entitled to consideration: Citizens of the United States who

owned properties in England, and subjects of the crown who owned properties in the colonies, and had not borne arms against the United States. They had no part in causing the war. Their ties of blood and their interests were all against it, and in their favor this covenant was made. What was and is the effect of it? Mr. Jefferson, in his letter to the British ministers, treats it as of no binding force whatever. It was not, he says, an agreement *to do* anything, but merely *to recommend* something to be done.

The commissioners, he claimed, had no power to do more than recommend they could not bind the States. They represented Congress, not the States. It is singular that the Secretary should set up such pretension when the treaty on its face professes to be made between the United States and His Majesty, etc.

If the American commissioners could not bind the States in this particular matter of restitution, in what particular of the business they were sent to enter upon and settle—peace and amity—could they bind them? And how could the British Government be bound by engagements with agents who had no powers? This special pleading of Mr. Jefferson places the American commissioners in a singular attitude—that of professing to represent parties whom they had no power to bind by these engagements. But the contention of Mr. Jefferson seems without foundation. In the "Articles of Confederation and Perpetual Union," entered into between the States at Philadelphia on the 9th day of July 1778, we read as Article IX of that instrument the following:

"The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in cases mentioned in the sixth article (war with the Indians on the frontiers of the States), of sending and receiving ambassadors, entering into treaties and alliances, provided that no treaty of commerce shall be made whereby," etc. Here one would think there was the amplest power conferred on the United States in Congress assembled, covering the whole

extent of our foreign relations, and the authority "to bind or to loose" in respect thereof made "sole and exclusive." And not only this, but by the sixth article of the perpetual union, formed, it was agreed, "that no State without the consent of the United States in Congress assembled shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or State," etc.

Now here is not only conferred on "the United states 'the sole and exclusive power' to make war and peace (which of itself carries with it the power to make treaties), and of entering into treaties, but a prohibition on the individual States to do any of these things without the consent of Congress." If the grant to A of a sole and an exclusive power concerning certain enumerated things, accompanied with a prohibition to B, C, D, * * * X, Y, and Z to use such power does not confer such power, then I am at a loss to know what will.

The Supreme Court, in Ware vs. Hylton, 3, Dallas, 199, answered this contention In construing this IX of the Articles of Confederation, and discussing the same objections made by counsel as they were made by Mr. Jefferson in his letter, the Court says: "This grant has no restriction nor is there any limitation on the power of determining on what terms peace shall be made. A right to make peace necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power to decide the terms on which they shall be made. A war between two nations can only be concluded by treaty" (page 236). Again, "the authority to make war implies necessarily the power to make peace or the war must be perpetual. I entertain this general idea that the several States retained all internal sovereignty, and that Congress alone possessed all external sovereignty" (page 232). Cushing, J., on page 283 of the opinion, attributes the disclaimer of the American negotiation of a want of power directly to contract for the restitution of confiscated property and confining themselves to "an earnest ~~accommodation~~ recommendation" to the States to do so to the diplomacy of the American representatives.

THE MARYLAND ACT OF 1787, CHAPTER 25

The Maryland Act above referred to as confirming the Treaty of 1787, and making it the law of the State, absolutely without exception or reservation or explanation, is the Act of 1787, Chap. 25, which was passed by the General Assemby of Maryland about two years after the proclamation of the Treaty of 1783. It is in these words: "Be it enacted, etc., and it is declared, That the treaty of peace between the United States and His Britanic Majesty is the supreme law within this State, and be considered and adjudged in all courts of law and equity, and all causes and questions cognizable by the said courts respectively, ought and shall be determined according to said treaty and tenor, true intent and meaning thereof." This was a highly commendable and creditable resolution on the part of Maryland. It exhibits a disposition towards good faith in the execution of treaties. And it is a justifiable inference from this fact that she intended to pursue a course of conduct in that behalf in accordance with that recommendation of Congress.

By the ninth article of the treaty of 1794, between the United States and Great Britain, it was agreed "that British subjects who now hold lands in the United States, and American citizens who now hold lands in the domains of His Majesty, should continue to hold them respectively, and may grant, sell or devise them as if they were natives, and should have all legal remedies respecting such lands, and as to them should not be regarded as aliens." Taking the above provisions of these two treaties of 1783 and 1794, and the Maryland act of 1787 into consideration, with the light which contemporary history throws upon them, may we not finally assume—are we not bound to assume for the sake of that good faith "which," as Mr. Burke says, "binds the moral elements of the world together"—that they show a definite purpose on the part of the United States, and of Maryland, as one of the States, to execute, in that spirit of good faith which is the highest duty and the supreme interest of nations in their contracts and engagements with each other, the trust implied in the covenant for an "earnest recommendation" in the fifth article of the treaty of 1783, for the restora-

tion of confiscated estates? From this purpose they seemed to have been turned, perhaps, by the state of public feeling and the animosities engendered by the war to which Marshall, C. J., alludes in Fletcher vs. Peck, 6 Cranch, 137. But the right remains, and whenever the occasion arises that right should be done. There is no statute of limitations between nations. The occasion is come; an act of Congress has furnished it. It is for this Court now to adjudicate that right.

The United States now finds itself in control or possession (according to its own theory and contention) of a part of the estate of one of the parties in whose favor the fifth artticle of the treaty of 1783 was made and agreed to, and the Act of Maryland of 1787, chap. 25, was passed, and through a cession from that State. What is or should be its duty, on the plainest principles of equity, and on the faith of treaties? Do what it "earnestly recommended" should be done by the States, and what Maryland, its grantor, by its Legislature declared ought and should be done; make restitution or compensation. The United States are estopped from any other course. When a vendor sells an estate to which he has no title, and subsequently acquires title thereto, he stands, in equity, trustee of the title for his vendee. This is a settled principle regulating the transactions of individuals. Is there any reason why it should not regulate the transactions of governments in their proprietary relations?

"It is a general rule," says Strong, J., in delivering the opinion of this court in Irvine vs. Irvine, 9 Wall, 625, "that when one makes a deed covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the benefit of his grantee, on the principle of estoppel."

One ground on which Jefferson, in his note to the British Minister, sought to place his refusal to enter upon the consideration of any rights claimed by British subjects under this article of the treaty, viz: a defect of power, either in the American commissioners or in Congress, to do more than "earnestly

recommend" to the States a restitution of confiscated estates and property, was afterwards shown by the Supreme Court, in Ware vs. Hylton, 3 Dall. 199, to be unfounded. The other reason that such action would disturb titles of honest purchasers under the confiscation laws, has no application to this case. These lands remained the lands of Maryland (according to the Government's contention), one of the parties to the treaty, by its Act of 1787, chap. 25, in making that treaty "the supreme law of this State," and directing that it "shall be so considered and adjudged in all courts of law and equity, and that all causes in said courts * * * shall and ought to be determined according to said treaty and tenor, true intent and meaning thereof," until that State ceded them to the United States the high contracting party that made this "earnest recommendation" of restitution to Maryland and the other States because of a supposed defect of power to make the restitution itself. What the United States recommended to be done, now let it do, when that defect of power is surely cured, if it ever existed. It may be said in answer that such restitution is a matter for the legislative department of the government. Our reply is in the language of the Supreme Court in Smith vs. U. S., 10 Peters, 331. In filing this bill and making the heirs of James Marshall parties, "they bound themselves to carry into specific execution by patent every grant, concession, warrant or survey which before the 4th of March, 1804, had created any legal or equitable right in the property so claimed." This language was used with reference to the Louisiana treaty. It equally applies to the treaty of 1783.

1. We have thus shown a perfect and complete title to the premises in question in Mr. Henry Harford, under whom we claim, to the date of the confiscation act of 1785.

2. We deny that by anything in that act or by anything done under that act was that title divested by reason of—

a. The unconstitutionality of the act itself under the bill of rights and the then existing constitution of the State of Maryland; *b*, the invalidity and incompleteness of the proceedings

taken under the act to affect these lands; *c*, and as a corollary to these propositions that no title was vested in the State to these lands at the time of its ceding the territory or District of Columbia to the United States, and that, therefore, the title was protected by the express stipulations of the treaties of 1783 and 1794.

3. That even conceding the act of 1783 was valid and effectual for the purposes intended and that the title of Henry Harford was divested and put in the State of Maryland and was transferred to the United States by the act of cession, the United States took it under the trust or equity with which it was impressed by the fifth Article of the treaty of 1783, by the ninth Article of the confederation or agreement of perpetual union, the sixth Article of the Constitution of the United States and by the solemn engagement contained in the Act of the General Assembly of Maryland of 1784, Chap. on execution of the fifth Art. of the treaty of 1783, and they were bound by the faith of treaties as well as by the equities which prevail between man and man, and are of the highest and most indispensable obligation upon nations to restore the premises to the Harford heirs or their assigns.

XXI.

Laches, Limitations and Adverse Possession.

Assuming these propositions conceded, we now come to consider the remaining objections of the government to our right to recover the lands in controversy. The undisputed facts in this case demonstrate that it is one which presents no ground for the interposition of the statute of limitations, even had it been properly pleaded by the government, or for the application of the kindred doctrines of laches and adverse possession. Nature itself repudiates the application of them.

It may be and probably will be contended by the counsel for the United States that, conceding that we had at any time any rights to the premises in question, we have so long slept on

those rights as to forfeit them and all claim to any recognition of them, and limitations, laches and adverse possession may be set up as bars to a recovery of the lands or to any compensation for the intended appropriation of them for the contemplated improvements. Not waiving, but insisting on our objection to the interposition of the bar of limitations because not specially pleaded in this cause below as by rule of law it should be, in answer to this proposition we have to say—

1. That these lands under the Potomac have been overflowed by the tides of the ocean and by the waters that descend from the valleys and mountain-sides of the Alleghanies, from the time of the flood to the present day.

Title could be made, and as we have shown, was made to these lands themselves by grant from the King, but the waters which flowed over them were subject to the great public rights of commerce, fishing and navigation. These were paramount servitudes on the waters and the lands under them. Actual, visible possession by enclosure or cultivation they are not susceptible of in the nature of things, and by reason of these paramount servitudes in the public the only possesssion they are capable of under existing conditions is the possession the law casts, constructive possession, which by operation of law follows the title. That title we have; not the United States. It is held by high authority that the title to such lands overflowed by navigable waters is in abeyance while thus overflowed, and the exercise of any rights under it is suspended until by some agency of nature or man they become fast land, when the title is set into active life or operation. This view is dictated by reason and common sense and is supported by principle and authority. Had Mr. Harford or any one who claimed under him or after him gone out into the Potomac and staked their claims he or they would have been arrested, tried, convicted and punished by the authorities of Maryland or the United States for obstructing the navigation of the river, committing a public nuisance, and his or their plea to the indictment of ownership in the land would have been demurred to,

and the demurrer thus admitting the ownership in the land would have been sustained on a principle so plain that a statement of it is conviction.

What the United States might or could have done by way of asserting the title it claims or is considered to claim by the history of the Act of Congress authorizing this suit, is another thing. The plain fact is that they have done nothing to affect the title of these respondents to the premises in question. The owner of a complete and perfect title is not required to do anything to assert his title, whether his land be under the water, or is a part and parcel of a barren waste, this title which he has consecrates that land to him, his heirs and assigns forever, though he or they may never have seen it.

It is the intruder, the trespasser, who must hustle if he wishes to convert his intrusion or trespass into a title, his wrong into a right. By enclosure, by building, by cultivation, by some other equally unequivocal acts denoting and demonstrating "an actual, visible, notorious, continuous, distinct and hostile possession," as Duncan, J., observes in the leading case of Hawk vs. Senseman, 6 Sergt. & R 21, must the intruder make good his claim to land to which he has no title, under some statute made for the purpose, like that of limitations, to the conditions and requirements of which he is strictly held. The object of the statute of limitations, like that of the Statutes of Fraud, was to prevent litigation; it was to give repose to titles, not to disturb them, by fixing a period, beyond the expiration of which inquiry into titles should not be suffered to go. The effacing hand of time, the innumerable vicissitudes of human life might destroy all written evidence of title, but possession created a pregnant, which by statute was turned into infallible, presumption of title. Of itself it was a landmark. If you ask for my title, look around you; would I enclose, build, sow and reap on land to which I had no title? it enabled the holder of the land to say.

But it is not the mere efflux of time which creates the presumption, which is a common error; but that and something

more, possession—possession marked with the notes of actuality, visibility, notoriety, continuity, distinctness and against the world.

"The principle on which the statute of limitations is predicated," says Mr. Angell in his work on that subject, "is not that the party in whose favor it is invoked has set up an adverse claim, for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered; a mere claim of title unaccompanied by adverse possession gives no right of action to the person against whom it is asserted, and consequently *his* rights are unaffected by the statute." Ch. J. Dorsey, in Abell vs. Harris, 11 G. and J., 372, says: "The principle on which the operation of the statute of limitations is predicated, is not that the party, in whose favor it is invoked, has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by the invasion of the rights of the opposite party as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title unaccompanied by adverse possession gives no right of action to the person, and consequently the rights are unaffected by the statute." (On this point, especially as applicable to lands under navigable waters, see remarks of Johnson, Chancellor, Chapman vs. Hoskins, 2 Md. Ch., Dec. 495.) "The law," says the Supreme Court in United States vs. Arredondo, 6 Peters, 743, "deems every man to be in the legal seizure and possession of land to which he has a perfect and complete title; this *seisin* and possession is co-extensive with right and continues till he is ousted by an actual adverse possession. This is a settled principle of the common law recognized by this Court in Green vs. Litter, 8 Cranch, 229; Barr vs. Gratz, 4 Wheaton, 213; Propagation Soc. vs. Pawlet, 4 Peters, 480, and it is not now to be questioned." The statute requires three things to put it into

operation—a party capable of suing, a party capable of being sued, and a cause of action. These three elements must coalesce in any given case to start the statute. The absence of any of them will defeat it.

From this summary it will be observed that the statute will not begin to run until after a cause of action has arisen in favor of the person having the rightful title, or in other words, until he has been disseized by the person in possession or those in privity with him.

As to the notes or requirements to support the plea of adverse possession, see Holtzman vs. Douglas, 168 U. S. R., 278.

1 Woods on Limitations, Chap. 20, Sec. 256.

Fairfax v Hunter 7 Cranch 619.

"It cannot be said," observed Chief Justice Abbot in Murray vs. East India Co., 5 B. and Ald., 204, "that a cause of action accrues unless there be a person in existence capable of suing."

See also on this point—

Davidson vs. Beatty, 3 Harris & McHen., 621.
Campbell vs. Shipley, 41 Md., 96.
Smith vs. Dennis, *et al.*, 33 Md., 451.
Smith vs. Wilson, 17 Md., 466.
Browne vs. Trustees, 37 Md., 108.
Haslett vs. Glenn, 7 Harris & Johnson, 25.

The United States, as a sovereign, cannot be sued without its consent, the acts of Congress establishing and giving jurisdiction to the Court of Claims and the act of March 3, 1887, give no jurisdiction in cases of tort.

2 Story on the Constitution.
Hill vs. United States, 147 U. S. R., 598.
Gibbons vs. United States, 8 Wall., 269.
Langford vs. United States, 101 U. S. R., 341.
United States vs. Jones, 131 U. S. R., 1, 16.

As the statute requires parties capable in law of suing and being sued before it begins to run, so it requires "a cause of action," a present right capable of being enforced, and to which a wrong or injury has been done for which the law has provided a remedy. Now, it may be observed that when the beds and soils of rivers and of navigable waters are, as we have shown, capable of ownership, it is recognized that they form a very peculiar property.

Injuries done to such properties must necessarily by the nature of things be very rare indeed. The rights to such property are termed by some writers inchoate rights, and causes of action arising out of them are and must be equally rare. These beds and soil possess little or no value so long as they are flowed over by the waters; it is only when by some natural or artificial means the waters over them cease to flow, and they are likely to become dry land, that they begin to possess value. The use of these waters for the purpose of fishing, commerce and navigation, the great public servitudes to which they are subservient by the common law, is not adverse to, but entirely consistent with, the rightful title to the lands under them.

The rights of riparian proprietors on navigable rivers to construct wharves from their properties out into the water, the extent being regulated by municipal law as incident to their ownership in the lands of the bank and shore and their adjacency to the waters, is regarded by some authorities as in the nature of a franchise, license or easement, rather than as conferring or carrying with it absolute title to the land under such structures. That would seem to be the better view; it reconciles better the authorities. The maxim that land cannot be appurtenant to land holds with this conception, but it is repugnant to the theory that such use and occupation give absolute title to the land in the absence of any statute conferring such title absolutely, and that any statute can give such title is at least doubtful.

Wheeler vs. Stone, 1 Cushing, 313.
Drake vs. Curtis, Ibid., 395.

"Under a grant of an easement the occupation of it must be regarded as the exercise of the right granted, but not of the land on which it is exercised. And in relation to land the statute only begins to run when the land is converted to uses other than those specified in the grant. The statute does not run against one who has no right to dispute the possession."

Preston vs. Evans, 56 Md., 476.

"No man can be barred by the statute of limitations for not bringing his action within the prescribed period until it is first shown that he had a cause for action which he could have maintained."

In analogy to the statute no presumption can arise against a party on the ground of a long enjoyment of a privilege by another until it is shown that the privilege in some measure interfered with the rights of the party whose grant is proposed to be presumed, and that he had a legal right to prevent such enjoyment by law." Angell on Water-courses, Sec. 215; Union Mills vs. Ferris, 2 Sawyer, 176. In a word, tribunals are open for the trial of disputed rights, for the redress of wrongs and injuries. Courts are opened not for the assertion of abstract rights or the discussion of academic questions, but of actual rights and the redress of actual wrongs.

The law does not furnish remedies to those who have suffered no wrongs in person or property. And we submit, therefore, that the conditions requisite under the law for the interposition of the statute of limitations do not exist in this case; in this that there was no party against whom suit could be maintained and no right of action had accrued until the institution of this suit.

XV.

Adverse Possession and Abandonment.

The adverse possession relied upon by the party setting it up against the owner of the title in order to make it effectual in law must be—

1. Actual—that is, there must be an entry in order that an ouster may be made and an adverse possession be begun; a going upon the land with the palpable intention to claim possession. It must be visible, notorious, distinct, continuous and hostile. A party cannot make his title under the statute by simply making a claim; that claim must be accompanied by acts, by deeds as well as words, to be seen and known of men, his neighbors and others that the rightful owner, if any, may have notice or may be presumed to have notice of the claim. It must be distinct as to character and definite as to locality and boundaries made so by fences and enclosures. It must be continuous; any break in the chain of possession extending through the period prescribed by statute will interrupt the running of the statute, and the party claiming will have to begin afresh; the statute will have to begin again. The trespasser cannot tack separate and distinct possessions made by himself, or by himself with others. And, finally, they must be adverse to the real owner, distinctly and unequivocally. For every intendment or presumption is made in favor of the holder of the lawful title. For these positions see—

Hawk vs. Senseman, 6 S. & R. 21, a leading case on the law of adverse possession, the authority of which was recognized in Morrison vs. Hammond, 27 Md. 684, and Beatty vs. Mason, Ibid. 409. See also—

Butz vs. Ihrie, 1 Rowle, 218.
Miller vs. Shaw, 7 S. & R., 129.
Mayor et al. vs. Riddle, 25 Penn. St. R. 259.
Holtzapple vs. Philibaun, 4 W. C. C. R. 356.
Lessee of Potts vs. Gilbert, 3 Wash. C. C, 478.
Green vs. Litter, 8 Cranch 219.
Brandt vs. Ogden, 1 John 150.
Hall vs. Low, 102 U. S. R. 461.
Hoye vs. Swan's Lessee, 5 Md. 237.
Armstrong vs. Risteau, Ibid 256.
Baker vs. Swan, 32 Md. 355.
Casey vs. Inloes, 1 Gill 495-507.
Wilson vs. Inloes, 6 Gill 121.
Hammond et al. vs. Inloes, 4 Md. 138.

In the last three cases the law of riparian ownership, the validity of grants of lands covered by navigable waters, adverse possession, etc., underwent a thorough discussion by counsel and court.

Blood vs. Wood, 1 Met. (Mass.), 528.
Adams vs. Jackson, 4 S. & R., 71.
Angell on Limitations, secs. 385–391 et seq., and pages 416–417.
2 Woods on Limitation, sec. 256 et seq.
2 Smith's Leading, Part II, p. 707, Am. note.

"The doctrine of abandonment," said Sergeant, J., in Naglee vs. Albright, 4 Wharton, 300, "does not apply to lands held by a complete and perfect title; nor is it an admission of ouster."

In Mayor vs. Riddle, 25 Penna. St., R. 263, Woodward, J., said: "The constructive possession of land not accually occupied follows the legal title; that is, in contemplation of law every man is in possession of the land he owns until ousted by an intruder, and an abandonment of title is not to be presumed from non-entry nor from neglect to pay taxes. The law does not limit a man's title to *possessio pedis*. He may own lands he never saw, and an entry once in evey cycle of twenty years is not necessary to preserve title, because in the eye of the law he is in possession all the time. Rights may be abandoned, but abandoment is scarcely predicable of perfect titles." To the same effect on this point of abandoment are Miller vs. Shaw, 7 S. and R., 129, and Adams vs. Jackson, 4 S and R. 71.

Boston vs. Lecraw, 17 Howard, 824. In this case the Supreme Court said that, "as the city chose to leave their land unclaimed from the sea, they could not hinder the public navigation over it when covered with water, and could not therefore be properly said to acquiesce in that which they could not hinder. * * * The right has existed and been exercised for thousands of years, but is not hostile to the defendants."

2 Smith's leading cases, part II, 729. Am. note (8th Ed.)

Neither adverse posession nor abandoment, therefore, by these tests of the law, can be set up or maintained against the first and paramount title now vested in these respondents.

ESTOPPEL, AND ITS APPLICATION TO THIS CASE.

On this point our position is this: The United States by the treaty of 1783 with Great Britain secured rights and advantages of the greatest value and the highest importance: a vast territory, the seats of future commonwealths; the free navigation of the Mississippi; the fisheries of Newfoundland, and the recognition of her independence as a nation. The two stipulations to be performed on our part as considerations for these great acquisitions, were:

1. Free access to the courts to the British creditor to recover his claims against the American debtor—this stipulation was mutual.

2. A covenant that Congress would "earnestly recommend" to the several States the restoration of confiscated estates and property to "real British subjects," etc. By the term "real British subjects" was meant, those who had always resided in Great Britain, not American loyalists or tories. Other clauses in the fifth article of the treaty were intended to embrace them.

It is known as a matter of history that the British negotiator insisted at first on a distinct agreement for a full restoration of the property and estates of this class of subjects, urging the hardship of their cases, their non-participation in active hostilities, etc. They certainly did seem to have some just claim to an exception in their favor. Their position was not one of their own choice. Mr. Henry Harford, the devisee of Frederick Lord Baltimore, and the last Lord Proprietary, was one of this class. Of all the men in England it my well be supposed he was most averse to the war, for whether successful or unsuccessful on the part of Great Britain, it could not fail to bring loss and disaster to him, for the bulk of his fortune and estate were on this side of the water. There were others in the same

case. The American negotiators declined to accede to this request on the part of Great Britain, alleging want of power in Congress to bind the States by such engagement. We have discussed that question and shall not renew it. What these gentlemen did, however, was to agree and covenant that Congress should "earnestly recommend" such restitution to the States."

That recommendation was made, but it was wholly ineffective. The present Government of the United States, succeeding to all the rights of the Government of the States, under the Articles of Confederation, and bound by the principles of international law, as well as by the express language of the sixth article of our present Constitution, to all the debts and engagements of the government of which it was a successor, now finds itself in the possession of a part of the estate and property of the heirs and assigns of one of this class of persons, whose estates and property, confiscated by Maryland during the war, it solemnly covenanted and agreed it would earnestly recommend that State to restore.

It holds and claims that property under a deed from Maryland. And we say, in conclusion, that by the faith of treaties, by every obligation of good faith and honor, upon every principle of an equity which is daily administered in our tribunals between man and man, the United States should now do that which they bound themselves to earnestly recommend the State of Maryland to do—restore this property on which the trust of a treaty rests to the heirs and assigns of Henry Harford, the last Lord Proprietary of the Province of Maryland, or award just compensation.

A. LEO KNOTT,

Solicitor for Appellants, the Heirs of James Markham Marshall.

RECAPITULATION OF THE POINTS MADE IN THIS BRIEF.

I. That lands lying under navigable waters subject to tidal overflow are part of the *jus privatum* of the King, subject to the public rights of fishing and navigation in the waters overflowing them, but lie in grant from the King subject to these public rights in the waters.

II. That the grantee of the King takes and holds a good title to such submerged lands, subject to these public rights, denominated servitudes or easements, and can dispose of these lands subject to these public rights in the waters.

III. That these public rights or servitudes *are in and of the waters in which they are enjoyed and exercised by the public, per se*, and are not on the lands, *per se*, under the waters.

IV. That, as a necessary logical and legal consequence, when by any artificial lawful means, or by any natural or physical cause, these overlying, tidal or overflowing waters cease to lie or flow over these lands, and they become thereby (permanently) fast and firm land, these servitudes or public rights in these over-waters cease and determine by the ceasing and determining of the element in which they alone can have their being or can be enjoyed or exercised *cessante ratione cessat quo que lex*, and that *eo instanti* the title of the owner of these lands, suspended or in abeyance during the period of the flowing and overlying of the waters, becomes effective and his right of possession attaches, but not till then can he assert that title.

V. That laches cannot be imputed to, nor the statute of limitations be invoked against, such owner, nor can title by adverse possession begin or be made against him, until such conversion of these lands into firm and fast land.

VI. That Charles I, in his charter of June, 1632, conveyed to the Lord Proprietary of Maryland, *enter alia*, full title to the lands under the navigable waters and rivers subject to tidal overflow, within the limits of that charter, subject to these servitudes, with the right to grant such lands to others, subject to the same, so long as they remained covered by such waters.

VII. That the King in the said charter granted to the Proprietary of the Province of Maryland the whole bed and soil of the Potomac River, from bank to bank, and from its source to its mouth, the *locus in quo* of the lands here in controversy.

VIII. That the said Proprietary held such lands as he held his other lands—in absolute ownership and propriety, but subject to the public servitudes in and of the waters over them, so long as those waters covered the lands.

IX. But when the waters ceased to be or flow over them, these lands were relieved of these servitudes and his right of *seisin* or possession attached and perfected his title of this, his heirs or assigns could take the benefit and advantage, it holding title at that time of such conversion.

XI. That by the action of the Government of the United States in reclaiming these lands for public purposes, and converting them into firm and fast lands, and passing the act of August 5, 1866, bringing suit against these appellants and others, the first opportunity was given to these appellants to make or assert their title.

XII. That title was legally derived to them by the devises and deeds set out in the Record.

XIII. That these lands, being part of the territory ceded by Maryland to the United States, the rule of property in respect of such lands prevailing in Maryland at the time of such cession, and as expounded by her courts, must prevail in this case, decisions in the courts of other States, or by this court, as to property in other States, to the contrary notwithstanding.

XIV. That having shown title to these lands derived to these appellants, the heirs of James Markham Marshall, they are entitled to the *seisin* and possession thereof, under the reclamations thereof made or to be made; and that in consequence of such reclamations and of the Act of Congress directing the institution of this suit, they are entitled to just compensation for the lands taken, or to be taken, by the government, under its right of eminent domain, for public purposes.

Unless per contra this title has been forfeited by law by someone holding it. But,

XV. This title was not forfeited, because,

1. The title to these lands under waters is of such character that the owner thereof, not having right of possession, or *seisin*, or right of entry thereon, they could not be forfeited nor confiscated

2. The Revolution did not and could not of itself work a forfeiture or confiscation of property rights, while it was effectual to extinguish the Proprietary's government.

3. That the confiscation acts of Maryland were ineffectual for this purpose, for the reason above assigned (No. 1), and for the additional reasons,

(*a.*) That no actual entry or *seisin* was made on or of them, or could be made.

(*b*) That these acts were in derogation of the common law, and—

(*c*) In derogation of the express provisions and inhibitions of the constitution and Bill of Rights of that State, adopted by the people of Maryland four years before the passage of these confiscation acts by the Legislature of that State.

XVI. That not having been forfeited nor confiscated, the sixth article of the treaty of 1783 and the ninth article of the treaty of 1794—"The Supreme Law of the Land"—saved and continued this title to Henry Harford, "his heirs or assigns."

But if forfeitable and forfeited, then—

XVII. That by force of the V. Art. of the treaty of 1783, in connection with the IX. Art. of the treaty of 1794, of the resolution of recommendation of restitution passed by Congress in pursuance of said Art. V., treaty of 1783, and of the Act of the General Assembly of Maryland 1787, chap. 25, passed in pursuance of said V. Art. and of said resolution of Congress, making the treaty of 1783 the law of the State; these lands never having been seized, sold or disposed of, were restored to Henry Harford; and—

XVIII. That the United States, under the VI Article of the Constitution of the United States, by which it ordained: "All debts, contracts and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation," "and all treaties *made* or which shall be made by the authority of the United States, shall be the Supreme Law of the Land," having (it is claimed) come into possession of these lands, are bound as a matter of solemn contract and engagement, as well as of right and equity, to restore these lands to these appellants, the assigns of the heirs of Henry Harford, or taking them, to pay just compensation therefor.